92-1545

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Petitioners,

v.

THE CITY OF IOWA CITY, IOWA, and
JOHNSON COUNTY, IOWA,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner generated a fact question concerning her claim that flights directly on her property constitute a taking which requires just compensation under the fifth and fourteenth amendments to the the United States Constitution.

2. Whether Petitioner's Application for Limited Remand, concerning a possible prohibition against penetration of approach slopes, should have been granted to permit Petitioner to develop evidence on her claim that the Airport zoning ordinance constitutes a regulatory taking which requires just compensation under the fifth and fourteenth amendments to the United States Constitution.

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OPINIONS BELOW

The Iowa Supreme Court issued its final opinion in this case on November 25, 1992, a copy of which appears in the Appendix to this Petition at page 1a. The November 25, 1992, opinion has not yet been reported.

The Iowa Supreme Court issued its first opinion in this case on June 17, 1992, a copy of which appears in the Appendix to this Petition at page 59a. The June 17, 1992, opinion has not been reported.

The Iowa Court of Appeals issued its opinion in this case on December 31, 1991, a copy of which appears in the Appendix to this Petition at page 49a. The December 31, 1991, opinion has not been reported.

The Iowa District Court issued its opinion in this case on November 1, 1990, a copy of which appears in the

Appendix to this Petition at page 42a. The November 1, 1990, opinion has not been reported.

JURISDICTION

The judgment of the Iowa Supreme Court was entered on November 25, 1992. A timely Petition for Rehearing was filed, and the Iowa Supreme Court denied the Petition for Rehearing on December 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONS AND STATUTES INVOLVED

This case involves the fifth and fourteenth amendments to the United States Constitution which respectively provide:

fifth amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor deprived of life, liberty, or property, witnout due process of law; nor shall private property be taken for public use without just compensation.

fourteenth amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion to which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for service in suppressing insurrection and rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

This case also involves the following regulations and municipal zoning ordinances:

> 14 C.F.R. Part 77 (1989), a copy of which is attached to the Appendix to this Petition at page 116a.
>
> IOWA CITY, IOWA, MUNICIPAL CODE, sections 84-3211, 90-3446, copies of which are attached to the Appendix of this Petition at page 74a.

STATEMENT OF THE CASE

Petitioners (hereinafter "Fitzgarrald") own approximately ten (10) acres of land adjacent to the Iowa City Municipal Airport. Fitzgarrald purchased her land in the 1940's and built a house thereon. When Fitzgarrald purchased the property, the Iowa City airport was operating at its current location. Fitzgarrald also owns and operates a mobile home park on the property. The mobile home park has been a non-conforming use since respondent Johnson County ("the County") zoned Fitzgarrald's land residential in 1960. Fitzgarrald's property is located near the end of one of the airport's runways (runway 6-24).

In November 1984 respondent City of Iowa City ("the City") decided to expand airport operations and extend runway 6-24. To help facilitate airport expansion, the City and the County in 1984 jointly adopted a zoning ordinance which enacted height and use restrictions on property surrounding the airport. The ordinance prevented structures from penetrating an "Approach Overlay Zone," which is a plane beginning 200 feet from the end of the runway and extending skyward at a slope of thirty-four horizontal feet (one vertical foot (34.1 slope)). With the initially proposed 1060-foot extension of runway 6-24, the appropriate "approach slope" penetrated Fitz-

garrald's home and some of their ground. Structures which already penetrated the approach slope or otherwise failed to conform to the ordinance were permitted to remain unaltered as nonconforming uses.

In August, 1986 the City initiated condemnation proceedings to acquire 1.18 acres of Fitzgarrald's property for the runway extension. The award in that proceeding is a separate matter on appeal. Fitzgarrald did, however, initiate a mandamus action to force the City to acquire an avigation easement over her property. In October, 1987 the City initiated such an action, but the action was voided by the District Court because the City could not identify what it purported to condemn. No further action has been taken by the City to acquire an avigation easement over Fitzgarrald's land.

To date runway 6-24 has been extended 335 feet instead of the initially-proposed 1000 feet, and the 1984 joint City-County ordinance was amended accordingly. Under the amended ordinance, Fitzgarrald's house still penetrates 6.9 feet into the approach slope. Fitzgarrald's use of her property remains unchanged as a nonconforming use. The ordinance, even as amended, places the majority of Fitzgarrald's property in a "clear overlay zone." Along with height restrictions, the "clear zone" has the following use restrictions:

> Use limitations. No use shall be permitted in the OCL zone in which there is connected therewith a building which according to the 1982 edition of Uniform Building Code, has an occupancy rating of 50 square feet of floor area per person or less. In addition, the following uses shall not be permitted:
>
> (a) Campgrounds
>
> (b) Fairgrounds
>
> (c) Hospitals and institutions
>
> (d) Motels and hotels
>
> (e) Nursing and custodial home

(f) Residential uses

(g) Restaurants and similar eating and drinking establishments

(h) Sanitary landfills

(i) Schools, including nurseries, pre-kindergartens and kindergartens

(j) Stadiums

(k) Storage of fuel or other hazardous materials

(l) Theaters

IOWA CITY, IOWA, MUNICIPAL CODE Article V, Section 4-75(d)(3) (1990) (app. p. 105a).

Although exceptions and variances from the use limitations are allegedly permitted, while the case was on appeal, Fitzgarrald obtained a letter from the Federal Aviation Administration ("FAA") concerning its position on development which penetrates the approach slope. Fitzgarrald filed an Application for Limited Remand based on the FAA letter, and this will be discussed later.

Fitzgarrald, on December 15, 1986, initiated this mandamus suit to force the City to institute condemnation proceedings concerning the land. Fitzgarrald amended the petition on April 1, 1988 to allege that a taking, in violation of the fifth amendment to the United States Constitution and Article I, Section 18 of the Iowa Constitution, had occurred by virtue of the imposition of the ordinance extension of runway 6-24 (regulatory taking) and use of the airport (physical invasion.) (Plaintiff's Amended Petition of 4/1/88 (app. at 13a)).

Trial was held by the district court on August 7 and 8, 1990. Fitzgarrald presented evidence concerning the effect of airplanes flying directly over the property and the diminished value of her property due to the enactment of the ordinance.

Fitzgarrald testified that subsequent to the extension of runway 6-24, the noise from the air traffic increased

and mobile home park tenants therefore left. Fitzgarrald related one incident where a large freight plane landing flew so low that the pilot could be seen from beneath the awning of a second-floor window of her home. Fitzgarrald also testified about how her house occasionally shook and vibrated when aircraft landed on runway 6-24.

Bob Michelson, an engineer, testified concerning the economic impact of the City-County ordinance. Michelson indicated that the ordinance had a substantial adverse impact on the value of Fitzgarrald's land. Michelson did not relate an exact dollar figure concerning the impact of the ordinance.

The City and County presented evidence concerning the use of runway 6-24. Various pilots testified that they used the runway less and ignored recommended flight patterns which would go directly over Fitzgarrald's property. The pilot's agreed, however, that after the runway was extended, landing airplanes would fly closer to the Fitzgarrald property.

The City and County also argued that Fitzgarrald's claim was premature since variances and exceptions to use and height restrictions could be obtained, and Fitzgarrald had presented no development plan. Therefore, according to the City and County, Fitzgarrald's claim was not ripe for determination. The evidence shows that portions of the ground on the Fitzgarrald property penetrate the approach slope mentioned earlier. On other portions of Fitzgarrald's land there exists between 8 and 30 feet of space before penetration of the approach slope.

The court entered its ruling on November 1, 1990, denied Fitzgarrald a Writ of Mandamus and held that no "taking" occurred. Concerning Fitzgarrald's physical invasion taking claim, the court found that the traffic over the Fitzgarrald property did not increase due to the extension of the runway. *Fitzgarrald v. City of Iowa City*, No. 50400, slip op. at 9-10 (Dist. Ct. Iowa. Nov. 1, 1990)

(app. at 42a). The court noted that the prevailing winds in Johnson County were from the northwest, and runway 6-24 is not used under such conditions. *Id.* at 6. The court did not mention Fitzgarrald's testimony concerning tenants, the shaking of her house, or seeing a pilot from her home.

The court also held that no regulatory taking occurred. The court based its decision on seven reasons:

(1) The use Fitzgarrald made of the property both before and after the enactment of the ordinance is the same.

(2) The airport was in existence when Fitzgarrald purchased the property.

(3) Fitzgarrald has not contemplated a change in the use of the property.

(4) The FAA controls the uses to which the property may be put.

(5) The City and the County merely conformed to FAA regulations and the airport ordinance is no more restrictive than federal regulations.

(6) Variances and exceptions to the federal and municipality restrictions are possible.

(7) There has been no greater imposition on the Fitzgarrald property by the 355 foot extension of the runway.

Id. at 10. Based on the above, the court denied the relief requested by Fitzgarrald.

Fitzgarrald filed a timely Notice of Appeal on November 30, 1990. Fitzgarrald appealed the district court's holding that no taking had occurred in violation of Fitzgarrald's fifth and fourteenth amendment right to just compensation. The Iowa Supreme Court transferred the case to the Iowa Court of Appeals. The court of appeals entered its decision on December 31, 1991 and denied relief to Fitzgarrald, although on grounds different from those cited by the district court.

On de novo review, the court of appeals found that the airport ordinance constituted a taking. *Fitzgarrald v. City of Iowa City*, No. 1-436/90-1845, slip op. at 9 (Iowa Ct. App. Dec. 31, 1991) (app. p. 49a). The court based its decision on two grounds. First, the court noted that "extensive and repeated low flying caused annoyance to the plaintiffs." *Id.* at 8. Obviously the court believed a physical invasion of plaintiff's property had occurred. Second, the court noted that the land was in a prime location for development, and such development would be substantially curtailed by the height restriction. *Id.* The court stated that "[t]he regulation is so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. *Id.* at 9 (*citing Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)). The court held, however, that Fitzgarrald was not entitled to a Writ of Mandamus. *Id.* 9-10. The reason given by the court was that Fitzgarrald continued to use the property as before and had not applied for a variance; the matter therefore, according to the court was not ripe for determination. *Id.* Fitzgarrald timely applied for further review to the Iowa Supreme Court on the failure of the court of appeals to issue a Writ of Mandamus despite finding a taking, and the City and County timely cross-appealed on the court of appeal's holding that the ordinance and physical invasion of Fitzgarrald's property constituted a taking. By order dated February 28, 1992, the Iowa Supreme Court granted both Fitzgarrald's and the City/County's Applications for Further Review. *Fitzgarrald v. City of Iowa City*, No. 90-1845 (Iowa Feb. 28, 1992) (order granting application for further review) (app. at 57a). Argument before the Iowa Supreme Court was set for April 6, 1992. *Id.*

On March 31, 1992 Fitzgarrald filed an Application for Limited Remand with the Iowa Supreme Court. The Application was filed after Fitzgarrald's counsel received a letter on March 24, 1992 from FAA officials concerning

its (FAA) position on proposed structures which would penetrate the 34.1 approach slope. A copy of the Application For Limited Remand is attached to the appendix at page 147a. Fitzgarrald contended that the letter established an FAA policy prohibiting any penetration of the 34.1 approach slope. Fitzgarrald asserted that the letter showed that the FAA would not approve any proposed development which penetrated the 34.1 approach slope, and therefore the various and special exception portions of the City/County ordinance were meaningless. By order dated April 3, 1992, the Iowa Supreme Court agreed to hear argument on the Application for Limited Remand with the argument on appeal. *Fitzgarrald v. City of Iowa City*, No. 90-1845 (Iowa April 3, 1992) (order allowing oral argument) (app. at 58a).

The Iowa Supreme Court entered its first of two rulings on June 17, 1992. The court vacated the Court of Appeals decision and affirmed the district court. *Fitzgarrald v. Iowa City*, No. 141/90-1845, slip op. at 15 (Iowa June 17, 1992 (app. p. 59a). The court held that no regulatory taking occurred by virtue of the enactment of the ordinance because most of the uses proscribed by the ordinance had been proscribed by previous zoning ordinances and FAA regulations. *Id.* at 8-11. The court noted that Fitzgarrald made the same use of her property before and after the enactment of the ordinance. The court also found significance in the fact that the underlying county ordinance classified Fitzgarrald's property as residential, and according to the court, Fitzgarrald could not show a reasonable probability of getting the property rezoned. *Id.* Accordingly, the court found that Fitzgarrald's investment-backed expectation for the use of the land had not been frustrated, concluded that no regulatory taking occurred and affirmed the district court on this issue. *Id.*

The court next considered the physical invasion claim. The court noted that a mandamus court need only determine whether a factual issue exists that would permit a compensation commission or court on appeal to find an

intrusion that produced a measurable decrease in the property's market value. *Id.* at 11-15. The court also noted that, if any injury to market value is shown, there is no de minimus rule. *Id.* The court then held that Fitzgarrald's evidence on the physical invasion claim was insufficient to generate a fact question about whether the overflying aircraft produced a measurable decrease in property value. *Id.*

The court noted that the record contained no evidence of either the frequency or altitudes of planes flying over Fitzgarrald's land. *Id.* The court then stated that the City and County presented evidence that planes were taking off and landing with the same frequency or altitude before and after the runway extension. *Id.* The court did note the testimony of two pilots who indicated that planes fly lower over Fitzgarrald's property due to the runway extension. *Id.*

The court also held that Fitzgarrald's testimony was not sufficient to generate a fact question about a decrease in value due to low-flying aircraft. *Id.* Although Fitzgarrald testified that tenants left her mobile home park after the runway was extended, the court pointed to the fact that Fitzgarrald had no personal knowledge as to the reason why. *Id.* The court also stated that Fitzgarrald's loss-of-value evidence was directed only at the regulatory taking claim and that no witness testified that overflying aircraft adversely affected the market value of Fitzgarrald's property. *Id.* at 15. The court concluded that no physical invasion occurred and affirmed the district court on this issue. *Id.* The court did not address Fitzgarrald's Application for Limited Remand in its June 17, 1992 ruling.

On or about June 30, 1992 Fitzgarrald filed a timely Petition for Rehearing in the Iowa Supreme Court. Fitzgarrald claimed that the court failed to address the pending Application for Limited Remand concerning the FAA letter about development which would penetrate the 34.1

approach slope. Fitzgarrald pointed out that, due to the height restrictions associated with the 34.1 approach slope and a possible FAA policy against any penetration thereof, the court should remand the case to permit the presentation of evidence about the letter from the FAA attached to the Application for Limited Remand. Fitzgarrald pointed out that if the letter means what it says (that the FAA would not permit penetration into the 34.1 approach slope), Fizgarrald could not develop her property even in conformance with the pre-existing County zoning ordinance (which zoned the Fitzgarrald property residential), and therefore a regulatory taking occurred. Fitzgarrald also pointed out that residential development is prohibited in the clear zone. By order dated July 17, 1992, the Iowa Supreme Court required the City and County to respond to the Petition for Rehearing. On October 2, 1992 the Iowa Supreme Court granted Fitzgarrald's Petition for Rehearing on all issues submitted to the court of appeals and withdrew its prior opinion dated June 17, 1992. *Fitzgarrald v. City of Iowa City*, No. 90-1845 (Iowa Oct. 2, 1992) (order granting petition for rehearing) (app. at 71a).

The Iowa Supreme Court issued its final opinion on November 25, 1992, again affirming the district court and vacating the decision of the court of appeals. *Fitzgarrald v. City of Iowa City*, No. 141/90-1845, slip op. at 16 (Iowa Nov. 25, 1992) (app. p. 1a). The court again stated that Fitzgarrald failed to generate a fact question concerning the physical invasion claim and held that the court of appeals erred in concluding to the contrary. *Id.* at 12. Concerning the regulatory taking claim, the court, as in its previous opinion, noted that the use of the property had not changed, and the diminution of market value by virtue of the ordinance was insufficient to support a finding that a regulatory taking occurred. *Id.* at 12-16. Again, the court did not address Fitzgarrald's Application for Limited Remand.

On or about December 9, 1992 Fitzgarrald filed a second Petition for Rehearing based on the court's failure to address the Application for Limited Remand. The court denied Fitzgarrald's Petition by order dated December 23, 1992 (app. at 73a).

REASONS FOR GRANTING THE WRIT

This case involves Fitzgarrald's right to just compensation arising by virtue of the imposition of an airport ordinance, the extension of an airport runway and the use associated therewith. As previously stated and concerning Fitzgarrald's physical invasion claim, the Iowa Supreme Court held that Fitzgarrald failed to generate a fact question about whether the flights directly over her property could rise to the leve of a taking. The court also denied Fitzgarrald's Application for Limited Remand to develop evidence concerning whether the FAA would under any circumstances permit penetration of the designated approach slope. In making these determinations, the Iowa Supreme Court interpreted federal law in a manner inconsistent with prior decsions of this Court. Since the City and the County are currently debating further expansion of the airport in question, and numerous property owners in Iowa City and Johnson County, Iowa will be affected, this Court should grant certiorari to provide guidance as to the threshold of what constitutes a physical invasion from overhead flights. This Court should also grant certiorari to permit Fitzgarrald to determine the FAA's position concerning penetration of the designated approach slope. If the Court does so, the rights of property owners around the airport will be more clearly defined and recognized.

PHYSICAL INVASION

This Court has long held that a physical invasion by governmental authorities is a taking. *E.g.*, *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). This Court has also recognized that the noise

and vibration associated with overflying aircraft may amount to a physical invasion. *E.g., United States v. Causby*, 320 U.S. 256, 261 (1946). When a physical invasion is shown, "no matter how small the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas v. South Carolina Coastal Council*, —— U.S. ——, ——, 112 S.Ct. 2886, 2893 (1992). If a physical invasion is demonstrated, there is no de minimus rule. *Id.* By holding that Fitzgarrald failed to generate a fact question on the physical invasion claim, the Iowa Supreme Court held contrary to the above-cited precedent.

As previously stated, Fitzgarrald testified that subsequent to the extension of the runway, the noise from the air traffic increased and mobile home park tenants left. Fitzgarrald testified that her house occasionally shook when aircraft landed on the runway. Although the City and County presented evidence that planes were taking off and landing with the same frequency and altitude before and after the runway extension, two pilots indicated that, due to the extension of the runway, aircraft passed over Fitzgarrald's land at lower attitudes. The result from lower overhead flights is obvious (increased noise and vibration).

Despite the above testimony, the Iowa Supreme Court held that Fitzgarrald failed to generate a fact question on her physical invasion claim. Most significant to the Court, apparently, was Fitzgarrald's failure to have a witness testify that overflying aircraft adversely affected the market value of her property. *See Fitzgarrald v. City of Iowa City*, No. 141/90-1845, slip op. at 12 (Iowa Nov. 25, 1992) (app. at 1a). The court also noted that Fitzgarrald did not fix the frequency or regularity of overhead flights and could not say with certainty why tenants left after the runway was extended. *Id.* Parenthetically, Fitzgarrald notes that the evidence apparently was sufficient to convince the Iowa Court of Appeals to hold that a physical invasion occurred. *Fitzgarrald v.*

City of Iowa City, No. 1-436/90-1845, slip op. at 9 (Iowa Ct. App. Dec. 31, 1991) (app. at 49a).

Under the takings jurisprudence from this Court, Fitzgarrald did generate a fact question. As the Iowa Supreme Court noted, Fitzgarrald was not required to try her takings case before the mandamus court. Fitzgarrald's testimony concerning overhead flights establishes a physical invasion. The frequency and regularity thereof are matters to be heard in a condemnation proceeding and not the mandamus court. And while no witness testified that direct overhead flights caused a decrease in market value of Fitzgarrald's property, it stretches reality to argue that overhead flights could have any other effect. Most importantly, however, if a physical invasion is shown, there is no de minimus rule. *Lucas*, —— U.S. ——, 112 S.Ct. at 2893. Accordingly, since Fitzgarrald's testimony showed that overhead flights affected her property, the Iowa Supreme Court should have held that she generated a fact question about a physical invasion and granted her a writ of mandamus to determine the extent of the taking. The reasons the Iowa Supreme Court used to hold that Fitzgarrald failed to generate a fact question should not have been considered in the mandamus action but rather in a subsequent condemnation proceeding.

APPLICATION FOR LIMITED REMAND

Fitzgarrald filed an Application for Limited Remand (app. p. 147a) prior to the April 6, 1992 argument before the Iowa Supreme Court. Fitzgarrald argued that new evidence, discovered after the Iowa Court of Appeals decision, existed concerning the FAA's position on permitting development which would penetrate the designated approach slope. Based on the new evidence, Fitzgarrald contends that the FAA will not permit new residential development permitted by existing county zoning which penetrates the approach slope; if true, this evidence would nullify the City and County's argument that Fitzgarrald's

suit was premature, since Fitzgarrald would not be able to obtain a variance or special exception and penetrate the approach slope with potential development. The Iowa Supreme Court should have addressed Fitzgarrald's Application, and Fitzgarrald asks this Court to direct the Iowa Supreme Court to do so.

This Court recognizes that where regulation deprives all economically beneficial or productive use of land, a taking occurs. *Lucas*, —— U.S. ——, 112 S. Ct. at 2893; *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). The Iowa Supreme Court found it significant that Fitzgarrald still used her land in the same way before and after the imposition of the airport ordinance. *Fitzgarrald v. City of Iowa City*, No. 141/90-1845, slip op. at 14 (app. at 1a). While Fitzgerrald certainly still operates a mobile home park (the mobile home park is 6.35 acres) as a nonconforming use, the remaining 2.46 acres (Fitzgarrald's land is a 8.82 acre tract after condemnation of the 1.18 acres mentioned earlier) have no economic value if the FAA will not permit penetration of the approach slope. The evidence shows that the gap between Fitzgarrald's land and the approach slope ranges from 8 to 30 feet. Given the lack of space between the ground and the approach slope, any proposed development by Fitzgarrald would penetrate the approach slope. In other words, if the FAA will not permit penetration of the approach slope as Fitzgarrald contends is shown by the letter attached to her Application, Fitzgarrald cannot develop her land in accordance with the underlying residential zoning classification. The FAA's policy (according to its letter) eliminates the variance and special exception sections of the ordinance since the FAA will deny any variance or special exception which penetrates the approach slope. The ordinance, coupled with what Fitzgarrald contends to be FAA stated policy, deprives Fitzgarrald the economic use of approximately 2.46 acres of her land. The Iowa Supreme Court should have granted Fitzgarrald's Application for Limited Remand

to permit Fitzgarrald to determine FAA policy about penetration of the approach slope. Fitzgarrald asks this court to grant certiroari and direct the Iowa Supreme Court to do so.

CONCLUSION

Petitioner prays that a Writ of Certiorari issue from this honorable Court to review the judgment of the Iowa Supreme Court in *Fitzgarrald v. City of Iowa City*, No. 141/90-1845, slip op. (Iowa Nov. 25, 1992) (app. at 1a). In the event that the Petition is granted, petitioner prays that the judgment of the court below be reversed, that the cause be remanded, and that the court below be directed to issue the Writ of Mandamus as prayed for in the petition.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE SUPREME COURT OF IOWA

No. 141/90-1845

Filed November 25, 1992

DEAN A. FITZGARRALD and PHYLLIS FITZGERRALD,
Appellants,

vs.

THE CITY OF IOWA CITY, IOWA, and
JOHNSON COUNTY, IOWA,
Appellees.

On review from the Iowa Court of Appeals

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Landowners adjacent to municipal airport appeal from adverse judgment in mandamus action to compel condemnation. The court of appeals reversed. DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.

William L. Meardon of Meardon, Sueppel, Downer & Hayes, Iowa City, for appellants.

David E. Brown of Hayek, Hayek, Holland & Brown, Iowa City, for appellee City of Iowa City.

J. Patrick White, County Attorney, and Karen Lorenzen, Legal Intern, for appellee Johnson County.

Considered en banc.

CARTER, J.

Plaintiffs, Dean Fitzgarrald and Phyllis Fitzgarrald, who are landowners adjacent to the Iowa City Municipal Airport, appeal from adverse judgment in mandamus action to compel condemnation. The court of appeals concluded that a taking had occurred but that plaintiffs had not shown exhaustion of administrative remedies or the requisite "finality of taking" under the "variance" provisions of the ordinance. We granted further review of the court of appeals decision.

On June 17, 1992, this court filed an opinion deciding the issues on appeal. A petition for rehearing filed by plaintiffs was subsequently granted, and that opinion, which was never published, was withdrawn. After reviewing the record and hearing the arguments as originally presented and upon the petition for rehearing, we vacate the decision of the court of appeals. We affirm the judgment of the district court.

Plaintiffs own approximately ten acres of land adjacent to the southwest portion of the Iowa City Municipal Airport. The airport was in operation at the same location when plaintiffs purchased the property sometime in the 1940s. Throughout their ownership of this property, plaintiffs have resided in a dwelling located on the premises. In addition, they have operated a mobile home park on the property.

The property was zoned as residential subsequent to plaintiffs' purchase thereof, and the mobile home park operation has continued as a nonconforming use under that zoning classification. Plaintiffs have attempted to secure rezoning of the property so as to permit other commercial uses, but those efforts have proved unsuccessful. The most recent unsuccessful attempt to rezone the property was in 1978 when plaintiffs applied to Johnson County for rezoning to permit a motel operation.

Plaintiffs' property is located at the end of airport runway 6-24. In November 1984, the Iowa City Airport

Commission undertook a project designated as "Runway 6-24 Extension Project." This project contemplated that runway 6-24 would be extended 1000 feet toward plaintiffs' property. The extension required the taking of 1.18 acres of plaintiffs' land. To help facilitate this project, the City of Iowa City and Johnson County in 1984 jointly adopted a zoning ordinance prescribing height and use restrictions for property surrounding the airport.

The 1984 ordinance proscribed structures from penetrating an "Approach Overlay Zone," which is a plane beginning 200 feet from the end of a runway and extending skyward at a slope of thirty-four horizontal feet to one vertical foot (34:1 slope). This "approach slope" for the proposed 1000-foot extension of runway 6-24 penetrated the plaintiffs' home and some of their ground. Preexisting stuctures that did not conform to the ordinance were permitted to remain without alteration as nonconforming uses.

The ordinance also provided for a "Clear Overlay Zone," which places restrictions on uses for property located beneath it. A substantial portion of plaintiffs' property is within the clear zone. The ordinance provides:

> Use limitations. No use shall be permitted in the OCL Zone in which there is connected therewith a building which according to the 1982 edition of the Uniform Building Code, has an occupancy rating of 50 square feet of floor area per person or less. In addition, the following uses shall not be permitted:
>
> (a) Campgrounds.
> (b) Fairgrounds.
> (c) Hospitals and institutions.
> (d) Motels and hotels.
> (e) Nursing and custodial home.
> (f) Residential uses.
> (g) Restaurants and similar eating and drinking establishments.

(h) Sanitary landfills.
(i) Schools, including nurseries, pre-kindergartens and kindergartens.
(j) Stadiums.
(k) Storage of fuel or other hazardous materials.
(l) Theaters.

Exceptions and variances from the use limitations may be allowed in some situations and a special board of adjustment has been established to consider such applications. To a large extent, the ordinance incorporated restrictions already contained in Federal Aviation Administration (FAA) regulations applicable to property surrounding the airport. *See* 14 C.F.R. part 77 (1984).

In August 1986, the city initiated an eminent domain proceeding to acquire 1.18 acres of plaintiffs' property in fee for the runway extension. The award in that proceeding is the subject of an appeal in a separate action not affecting the present litigation. In December 1986, plaintiffs filed a mandamus action demanding that the city also condemn an avigation easement to permit flights over their property.[1] In October 1987, prior to adjudication of the mandamus action, the city did initiate eminent domain proceedings to obtain such an easement. That action was ultimately voided by district court order as a result of a faulty description of the interests being condemned. No further action has been taken by the city to acquire an avigation easement over plaintiffs' lands.

Ultimately, runway 6-24 was only extended 355 feet instead of the 1000-foot extension originally contemplated. The 1984 zoning ordinance was amended to accommodate this change. The primary result of these amendments was to change the height restrictions of the ordi-

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[1] In *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84, 87 (Iowa 1973), we described an avigation easement as one that permits free flights over land including those so low and so frequent as to amount to a taking of property.

nance to reflect the shorter runway. Under the amended ordinance, plaintiffs' dwelling penetrates 6.9 feet into the specified approach slope. Like the 1984 ordinance, the amended ordinance allows plaintiffs' nonconforming uses to continue without alteration.

When the ciay failed to reinitiate the aborted attempt to condemn an avigation easement, plaintiffs again pressed their mandamus action. They also amended that action to allege that the zoning ordinances were so restrictive of property uses that they constituted a regulatory taking for which compensation was due plaintiffs.

After hearing the evidence presented at the trial of the mandamus action, the district court concluded that the ordinances do not constitute a compensable taking of plaintiffs' property. The court also considered and rejected plaintiffs' claim that an avigation easement must be condemned by the airport authority because of a direct physical invasion of plaintiffs' lands by overflying aircraft. The latter claim was based on allegations that unreasonable noise and vibrations were occurring because takeoffs and landings to and from the extended runway were now more proximate to plaintiffs' property. The court found from the evidence that, in fact, there were fewer flights over plaintiffs' lands after the runway extension was completed than there were before that project was initiated.[2] Other facts relevant to the case will be considered in our discussion of the legal issues that have been presented.

I. *The Physical Invasion Claim.*

We first consider plaintiffs' claim that overflying aircraft so adversely affects the use and enjoyment of their property that a taking has resulted. In this regard, we note the Supreme Court's admonition that

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[2] The court of appeals apparently found that the overflights were a sufficient invasion to constitute a taking separate and apart from the alleged regulatory taking.

> [a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631, 648 (1978) (citation omitted). In some circumstances, overflying aircraft may amount to a physical invasion. *See United States v. Causby*, 328 U.S. 256, 261, 66 S. Ct. 1062, 1065, 90 L. Ed. 1206, 1210 (1946).

Mandamus is an equitable action. *Phelps v. Board of Supervisors*, 211 N.W.2d 274, 277 (Iowa 1973); Iowa Code § 661.3 (1985). Our review is thus de novo. Iowa R. App. P. 4. We tacitly recognized mandamus as a procedural device to compel condemnation of an avigation easement in *Dolezal*, 209 N.W.2d at 87-88. In that case, we recognized that an avigation easement may be required when flights are so low and so frequent as to amount to a taking of property. *Id.* at 87. Of course, every noise or interference with property as a result of overflying aircraft does not constitute a taking. Landowners must endure some level of inconvenience, discomfort, and loss of peace and quiet that can be reasonably anticipated by members of a progressive society. But, as the Minnesota court observed,

> when those interferences reach the point where they cause a measurable decrease in property market value, it is reasonable to assume that, considering the permanency of the air flights, a property right has been, if not "taken or destroyed," at the very least "damaged," for which our constitution requires that compensation be paid.

Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 486-87, 216 N.M.2d 651, 662 (1974). In such cases, the right to recovery is not for the nuisance that must be endured but for the loss of value that has resulted.

Although some courts have concluded that the issue of whether a taking has occurred in airport overflight cases is an issue of law for the mandamus court to decide in the first instance, *see, e.g., In re Ramsey*, 31 Pa. Commw. 182, 186, 375 A.2d 886, 888-89 (1977), we believe the better rule to be that the mandamus court should only determine whether a factual issue exists that would permit a condemnation commission or a jury on appeal of an award to find an intrusion that produced a measurable decrease in the property's market value. The mandamus court may find the evidence insufficient as a matter of law to compel the summoning of a condemnation commission, but that court is simply not called upon to rule as a matter of law that a taking has occurred. To do so would create an undesirable issue preclusion problem in a later trial of a condemnation proceeding. It is for the condemnation commission or trial jury to fix the loss of value, if any, suffered by the property owner. *Phelps*, 211 N.W.2d at 276.

If some physical invasion is in fact demonstrated, there is no de minimis rule. As the Supreme Court has observed:

> [N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasion].

Lucas v. South Carolina Coastal Council, —— U.S. ——, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798, 812 (1992). The following comments of a Washington court are instructive on this point:

> [T]he balance of interest inherently struck in this type of action comes about in the following manner. If the individual is unusually sensitive, and sustains a greater injury than might be suffered by the general public from such interference, the public interest in maintaining the flights leaves him to one remedy—to sell his property and move. This is no different

> than it would be had his land been condemned for forced sale to the state. But whichever way the state exacts such a "sale," it must pay the individual the amount he suffers in the diminishment of the value of his land . . . . Such lowering of market value reflects not the personal injury to the individual, but the lesser desirability of the land to the general public . . . .
>
> . . . [W]here there is only an injury of the extent such that it should be called or labeled "incidental," no measurable or provable decline in market value could be expected traceable to the flights. Recovery would not be forthcoming, but not because of some arbitrary rule set for convenience in administration of justice, but because of an inability to prove damages according to the common and well understood rules of suit. Second, and even more significant to the balancing problem, the smaller the provable decline in market value, the slighter the burden cast upon the public in paying for it. Surely the protection of the public interest does not entail the refusal of *small* claims on the ground that the burden to the public is not great enough to pay for!

Martin v. Port of Seattle, 65 Wash. 2d 309, 318, 391 P.2d 540, 546-47 (1964). We accept these principles and thus accept plaintiffs' argument that, on their physical invasion claim, they were not required to try their eminent domain case in full in the mandamus action. They were only required to present enough evidence to generate a fact issue as to whether the overflying aircraft produced a measurable decrease in property value.

Plaintiffs appear to have contended at one point in the litigation that the thirty-four horizontal feet to one vertical foot approach slope constituted the flight path of aircraft over their property on takeoffs and landings. The evidence reveals, however, that the approach slope is merely a clearance zone and bears no relationship to the

actual altitude of planes over the land to which the approach slope applies. The record is devoid of any evidence showing either the frequency or approximate altitudes of planes flying over plaintiffs' lands.

Defendants presented evidence that planes were taking off and landing with approximately the same frequency and altitude before and after the runway extension. Three pilots who testified for defendants indicated that after the runway was extended they altered their approach turns to runway 6-24 so as to keep farther away from plaintiffs' property. Two of these pilots conceded, however, that planes landing on runway 6-24 would now pass over plaintiffs' lands at lower altitudes as a result of the 355-foot runway extension.

Although plaintiff Phyllis Fitzgarrald testified as to some inconvenience from airport noise, she did not fix the frequency of such occurrences nor indicate that this occurred on a regular basis. She testified that some tenants of the mobile home park had left after the runway was extended, but admitted that she had no personal knowledge as to the reason why. No other evidence was offered concerning loss of tenants at the park. Most significant perhaps, for purposes of plaintiffs' physical invasion claim, is the fact that the loss-of-value evidence that they presented related entirely to their regulatory taking claim. None of the witnesses at trial testified that overflying aircraft adversely affected the market value of plaintiffs' property. Consequently, we are forced to conclude that there is a deficiency of proof as to the element of "measurable decrease in market value" due to overflying aircraft. The district court correctly rejected plaintiffs' physical invasion claim, and the court of appeals erred in concluding otherwise.

II. *The Regulatory Taking Issue.*

We next consider whether the district court was correct in deciding the regulatory taking issue adversely to plain-

tiffs. Although action by the state or its political subdivisions pursuant to the police power and the power of eminent domain were once thought to be separate and compartmentalized powers that did not overlap, this view has now been largely abandoned. *See* 2 A. Gaudio, *The American Law of Real Property* § 17.05, at 87-102 (1991). We have recognized the "inevitable danger" to private property that would exist if the "just compensation" requirements of the fifth amendment to the federal Constitution and article I, section 18 of the Iowa Constitution could be circumvented through the guise of police power regulations. *Business Ventures, Inc. v. Iowa City*, 234 N.W.2d 376, 381-82 (Iowa 1975).

We have previously observed that:

> [A] "taking" does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof. . . . [T]here has been a taking if, as plaintiffs contend, there has been a substantial interference with their use and enjoyment of their property . . . .

Phelps, 211 N.W.2d at 276 (citations omitted). Although not every police power regulation that restricts some beneficial use of property creates a compensable taking, *see Stone v. City of Wilton*, 331 N.W.2d 398, 404 (Iowa 1983), the frustration of investment-backed expectations by zoning ordinances may constitute a taking for which compensation is due. *See, e.g., Agins v. City of Tiburon*, 477 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 112 (1980) (application of general zoning law to particular property affects a taking if it denies the economically viable use of the land); *Osborn v. City of Cedar Rapids*, 324 N.W.2d 471, 474 (Iowa 1982) (action taken for public good that places uncompensated burden upon plaintiff's property not shared by public at large may constitute taking); *Woodbury County Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276, 278 (Iowa

1979) (even exercise of police power may amount to taking if it deprives owner of substantial use and enjoyment of property).

Plaintiffs offered the testimony of an expert witness who stated that there property was located in an area where commercial development was taking place. This witness expressed the view that the airport "clear zone" requirement was a detriment to the property's development potential. We believe the substance of that conclusion is to be strongly inferred from the record in the absence of expert testimony.

A loss of development potential may be a significant factor in "taking" claims based on zoning restrictions. *See Lucas*, —— U.S. at ——, 112 S. Ct. at 2893-94, 120 L. Ed. 2d at 813-14. Absent some physical invasion, however, a taking does not occur until there has been a substantial interference with investment-backed expectations. *Stone*, 331 N.W.2d at 404. There are two principles that we believe affect this determination. First, the court should look at the value of the use remaining rather than the diminution of value of the property. *Penn Cent. Transp. Co.*, 438 U.S. at 130-31, 98 S. Ct. at 2662-63, 57 L. Ed. 2d at 552-53.[3] Second, " 'taking' jurisprudence does not divide a single parcel into discreet segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.*

In the recent *Lucas* case, the Court again considered whether

> the situation [is] one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the

[3] We suggested that a regulatory taking may arise from "anything that substantially deprives one of the use and enjoyment of his property or a portion thereof" in *Phelps*, 211 N.W.2d at 276. That case, however, involved a physical invasion for which the "taking" criteria differ substantially from those applicable in regulatory zoning cases.

> owner has suffered a mere diminution in value of the tract as a whole.

Lucas, —— U.S. at ——, 112 S. Ct. at 2894, 120 L. Ed. 2d at 813. The Court suggests that this question turns on how the interest is viewed under state property law. *Id.* Damages for a partial taking under Iowa law are not measured by the value of the portion taken. They are measured by the diminution in value of the original tract. *See Twin-State Eng'g & Chem. Co. v. Iowa State Highway Comm'n*, 197 N.W.2d 575, 577-78 (Iowa 1972); *Powers v. City of Dubuque*, 176 N.W.2d 135, 138 (Iowa 1970). Thus, under state property law, we view the present interference as one in which the owner has suffered a diminution in value of the tract as a whole.

In light of the principles just discussed, we conclude that the alleged deprivation in the present case is much less severe than that which was hled to be insufficient to support a constitutional taking in *Stone*, 331 N.W.2d at 404. As was the case in *Stone*, these plaintiffs continue to have an economically viable use of their property even though its market value has to some extent been diminished as a result of the airport zoning ordinances. This loss of value is insufficient to support a finding that a regulatory taking has occurred. The court of appeals erred in determining otherwise.

We have considered all issues presented and conclude that the decision of the court of appeals must be vacated and the judgment of the district court affirmed in all respects.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

No. ———

DEAN A. FITZGARRALD AND PHYLLIS FITZGARRALD,
Plaintiffs,

vs.

THE CITY OF IOWA CITY, IOWA
Defendant.

PETITION FOR WRIT OF MANDAMUS

[Filed Dec. 15, 1986]

Plaintiffs state:

1. Plaintiffs are residents of Johnson County, Iowa, and the owners of certain real estate located immediately abutting and to the west of the Iowa City Municipal Airport, a facility owned and operated by the Defendant.

2. Plaintiffs' property consists of a tract of land having an area of between 6 and 10 acres which has been used for the operation of a mobile home court for many years.

3. During 1986 the Defendant, through the acts of its City Council, determined to extend Runway 6-24 of the Iowa City Municipal Airport and for such purpose determined to acquire property owned by these Plaintiffs and others.

4. Pursuant to such project, Defendant instituted condemnation proceedings and on November 18, 1986, condemned 1.18 acres of Plaintiffs' land.

5. Defendant has also adopted a glide slope of 34:1 for Runway 6 as a result of which aircrafts using said

glide slope will cause great annoyance, disturbance, and impair the safety of the aircraft, its passengers, and the occupants of Plaintiffs' mobile home court.

6. On October 7, 1986, Defendant's council passed a *resolution finding that it was necessary to acquire* an avigation easement over 5.02 acres of Plaintiffs' property, a copy of said resolution being attached hereto as Exhibit "A" and made a part hereof.

7. Notwithstanding the enactment of Exhibit "A", the Defendant has instituted condemnation proceedings for the purpose of acquiring fee title to only 1.18 acres of land owned by the Plaintiffs as more particularly referred to in the condemnation described in paragraph 4 above, a copy of the Notice of said proceedings being attached as Exhibit "B" and by this reference made a part hereof.

8. The Defendant should be required to acquire in *one condemnation proceeding* all of the interests of the Plaintiffs which have been or are being "taken" by the Defendant in connection with its airport extensions, modifications, and operation.

9. Plaintiffs have no plan, speedy, and adequate remedy at law.

10. Plaintiffs are private individuals having a personal interest in this matter and the failure of the Defendant to acquire the interest of the Plaintiffs in their property which have already been de facto "taken" is the proper subject of a writ of mandamus commanding the Defendant to institute condemnation proceedings immediately for the purpose of acquiring such interest.

11. Plaintiffs have demanded that such acquisition occur but Defendant has failed or refused to comply with such demand.

By reason of the foregoing, Plaintiffs ask that a Writ of Mandamus issue commanding the Defendant to forthwith institute condemnation procedures to acquire the

avigation easement more particularly described in Exhibit "A" as part of the condemnation referred to in Exhibit "B" and that the Plaintiffs be granted further auxiliary relief as may be proper and Defendant be ordered to pay the cost of this action including a reasonable attorney's fee (see Exhibit "C" attached).

MEARDON, SUEPPEL,
DOWNER & HAYES

By /s/ William L. Meardon
WILLIAM L. MEARDON
172 South Linn Street
Iowa City, Iowa 52240
Telephone:
319-338-9222
Attorneys for
Plaintiffs

EXHIBIT "A"

RESOLUTION NO. 86-312

RESOLUTION AUTHORIZING ACQUISITION OF CERTAIN PROPERTY INTERESTS BY NEGOTIATION OF CONDEMNATION IN CONNECTION WITH THE RUNWAY 6-24 EXTENTION PROJECT AT THE IOWA CITY MUNICIPAL AIRPORT.

WHEREAS, the City Council has approved funding for the Runway 6-24 Extension Project at the Iowa City Municipal Airport, and

WHEREAS, by Resolution 86-254 the City Council previously authorized institution of condemnation proceedings to acquire four parcels of real property necessary for said improvements at the Iowa City Municipal Airport, and

WHEREAS, as an integral part of said project, it is also necessary to acquire an avigation easement over 5.02 acres of private property owned by Dean and Phyllis Fitzgarrald. A plat and legal description of the property over which the easement is to be acquired is attached hereto and incorporated herein as Exhibit A.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF IOWA CITY, IOWA, that the Airport Manager be and is hereby authorized and directed to negotiate the acquisition of an avigation easement over the property of Dean and Phyllis Fitzgarrald, as hereinafter described, necessary for public improvements at the Iowa City Municipal Airport in conjunction with the Runway 6-24 Extension Project, which project this City Council deems to be for a public purpose and in the public interest.

AND BE IT FURTHER RESOLVED that in the event the Airport Manager is unable to acquire said property interests by negotiation, the City Attorney be and is hereby authorized and directed to institute and conduct

condemnation proceedings pursuant to state law to acquire said property interests.

It was moved by Dickson and second by McDonald the Resolution be adopted, and upon roll call there were:

AYES:	NAYS:	ABSENT:	
✔			AMBRISCO
	✔		BAKER
✔			COURTNEY
✔			DICKSON
✔			MCDONALD
	✔		STRAIT
	✔		ZUBER

Passed and approved this 7th day of October, 1986.

_____
Mayor

ATTEST:

_____
City Clerk

[Resolved & Approved By The Legal Department
10/2/86]

EXHIBIT "B"

IN THE MATTER OF CONDEMNATION OF CERTAIN LAND AND PROPERTY RIGHTS BY THE CITY OF IOWA CITY, IOWA, FOR THE USE AND BENEFIT OF THE CITY OF IOWA CITY, IOWA, PURSUANT TO CHAPTER 471 OF THE CODE OF IOWA (1985), FOR THE RUNWAY 6-24 EXTENSION PROJECT AT THE IOWA CITY MUNICIPAL AIRPORT, ON LAND DESCRIBED IN THE EXHIBITS ATTACHED HERETO AND MADE A PART HEREOF: ALL SUCH LAND LOCATED IN IOWA CITY, JOHNSON COUNTY, IOWA.

To: Dean A. Fitzgarrald and Phyllis Fitzgarrald
Highway 1 South
Iowa City, Iowa 52240

Johnson County, Iowa
c/o Johnson County Auditor
Johnson County Administration Bldg.
913 S. Dubuque Street
Iowa City, Iowa 52240

Johnson County, Iowa
c/o Johnson County Treasurer
Johnson County Administration Bldg.
913 S. Dubuque Street
Iowa City, Iowa 52240

State of Iowa
c/o Johnson County Clerk of Court
Johnson County Courthouse
Iowa City, Iowa 52240

State of Iowa
Iowa Dept. of Transportation
c/o Richard E. Kautz
Resident Maintenance Engineer
227 First Street
Iowa City, Iowa 52240

Iowa-Illinois Gas & Electric Co.
c/o Thomas T. Hoogerwerf, Gen. Mgr.
1630 Lower Muscatine Road
Iowa City, Iowa 52240

And all other persons, companies or corporations having any interest in or owning any of the following described real estate:

That part of the NE1/4 of the NE1/4 of Section 20, Township 79 North, Range 6 West, lying southeasterly of present State Highway No. 1, Westerly of the original State Highway No. 1, and Northeasterly of the county road, in Johnson County, Iowa, described as follows:

Commencing at the NE corner of said Section 20; thence S 01°45′ W along the East line of said NE1/4 a distance of 743.0 feet to a point on the southeasterly right-of-way line of present State Highway No. 1; thence S 38°04′ W along said right-of-way line 261.5 feet; thence S 24°59′30″ E along said right-of-way line 102.00 feet; thence N 36°18′ W along said right-of-way line 87.3 feet; thence S 11°69′ W along said right-of-way line 67.0 feet to a point on the centerline of the county road; thence S 36°18′ E along said centerline 85.9 feet to the beginning of a tangent curve to the right; said curve having a radius of 572.96 feet; thence southeasterly along said curve on said centerline 215.1 feet through a central angle of 21°30′50″ to a point on the centerline curve of said original State Highway No. 1; said curves not being tangent; thence northerly along the second curve 165.4 feet on the centerline of said original State Highway No. 1, said second curve having a chord bearing N 10°01′ E, a radius of 572.96 feet, and concave Westerly, through a central angle of 16°32′15″ to the point of tangency on the said East line of the NE1/4; thence N 01°45′ E along said East line on said cen-

terline of original State Highway No. 1 a distance of 393.6 feet to the point of beginning. Containing 1.18 acres, more or less. Subject to the county road and eastments of record. For the purpose of this description, the East line of the NE1/4 is assumed to bear S 01°45′ W.

YOU ARE HEREBY NOTIFIED that the City of Iowa City, Iowa, desires condemnation in fee simple of the above-described real estate as shown in the plat attached hereto as Exhibit A.

YOU ARE FURTHER NOTIFIED:

1. That such condemnation is sought for the purpose of improving the Iowa City Municipal Airport in conjunction with the Runway 6-24 Extension Project and that such condemnation is done pursuant to law as provided in Chapters 471 and 472, Code of Iowa (1985).

2. That a Compensation Commission has been appointed as provided by law for the purpose of appraising the damages which will be caused by said condemnation.

3. That said Compensation Commission will, on the 18th day of November, 1986, at 9:00 o'clock a.m., view said premises and proceed to appraise said damages at 1:30 o'clock p.m. at the Office of the Johnson County Sheriff, Iowa City, Iowa, at which time you may appear before said Commission if you care to do so.

CITY OF IOWA CITY

By: /s/ David E. Brown
CITY OF IOWA CITY
DAVID E. BROWN
Assistant City Attorney
410 E. Washington St.
Iowa City, Iowa 52240
ATTORNEY FOR
CONDEMNER

Filed in my office at Iowa City, Iowa, this —— day of ————————, 1986.

GARY HUGHES
Sheriff of Johnson County

ACCEPTANCE OF SERVICE

Service of the above and foregoing notice is hereby accepted and receipt of a copy thereof acknowledged, and I hereby waive time of service and/or any publication of such notice in a newspaper.

Signed at ————————, Iowa, this —— day of November, 1986.

/s/ Dean A. Fitzgarrald
DEAN A. FITZGARRALD

/s/ Phyllis Fitzgarrald
PHYLLIS FITZGARRALD

STATE OF IOWA)
) ss
COUNTY OF JOHNSON)

Received the within notice the —— day of November, 1986 ———, and I hereby certify that I have served the same on the persons named below, by delivering a true copy of the same to each of said persons at the time and place set opposite their respective names:

Name Month/Day/Year

Township/City/Town County State

Fees:

Service $——— GARY HUGHES
Mileage $——— Sheriff of Johnson County
By:
Total $——— Deputy

APPLICATION TO THE CHIEF JUDGE OF THE SIXTH JUDICIAL DISTRICT FOR THE APPOINTMENT OF A COMMISSION TO APPRAISE DAMAGES

IN THE MATTER OF THE CONDEMNATION OF CERTAIN LAND AND PROPERTY RIGHTS BY THE CITY OF IOWA CITY, IOWA FOR THE USE AND BENEFIT OF THE CITY OF IOWA CITY, IOWA, PURSUANT TO CHAPTER 471 OF THE CODE OF IOWA (1985), FOR THE RUNWAY 6-24 EXTENSION PROJECT AT THE IOWA CITY MUNICIPAL AIRPORT, ON LAND DESCRIBED IN THE EXHIBITS ATTACHED HERETO AND MADE A PART HEREOF: ALL SUCH LAND LOCATED IN IOWA CITY, JOHNSON COUNTY, IOWA.

To: The Honorable August F. Honsell, Chief Judge of the Sixth Judicial District, including Johnson County, Iowa

COMES NOW, City of Iowa City, Iowa, by and through its attorney, David E. Brown, Assistant City Attorney, and for purposes of making Application to the Court pursuant to Chapters 471 and 472, Code of Iowa (1985) does respectfully state as follows:

1. That the City of Iowa City, Iowa, is a municipal corporation, duly organized, authorized and existing pursuant to the laws of the State of Iowa.

2. That pursuant to and in compliance with the laws of the State of Iowa, the City Council of the City of Iowa City, Iowa, has determined that the public interest requires the City of Iowa City to make improvements for the Iowa City Municipal Airport on property commencing at

   That part of the NE 1/4 of the NE 1/4 of Section 20, Township 79 North, Range 6

West, lying southeasterly of present State Highway No. 1, westerly of the original State Highway No. 1, and northeasterly of the county road, in Johnson County, Iowa, described as follows:

Commencing at the NE corner of said Section 20; thence S 01°45′ W along the East line of said NE 1/4 a distance of 743.0 feet to a point on the southeasterly right-of-way line of present State Highway No. 1; thence S 38°04′ W along said right-of-way line 261.5 feet; thence S 24°59′30″ E along said right-of-way line 102.0 feet; thence N 36°18′ W along said right-of-way line 87.3 feet; thence S 11°59′ W along said right-of-way line 67.0 feet to a point on the centerline of the county road; thence S 36°18′ E along said centerline 85.9 feet to the beginning of a tangent curve to the right; said curve having a radius of 572.96 feet; thence southeasterly along said curve on said centerline 215.1 feet through a central angle of 21°30′ 50° to a point on the centerline curve of said original State Highway No. 1; said curves not being tangent; thence northerly along the second curve 165.4 feet on the center line of said original State Highway No. 1, said second curve having a chord bearing N 10°01′ E, a radius of 572.96 feet, and concave Westerly, through a central angle of 16°32′15″ to the point of tangency on the said East line of the NE 1/4; thence N 01°45′ E along said East line on said center line of original State Highway No. 1 a distance of 393.6 feet to the point of beginning. Containing 1.18 acres, more or less. Subject to the county road and

easements of record. For the purpose of this description, the East line of the NE 1/4 is assumed to bear S 01°45′ W.

Said property to be taken by condemnation proceedings as provided by law, as shown in "Exhibit A" attached hereto and incorporated by reference herein.

3. That the real estate affected and the record owners, lienholders, encumberances and all other persons interested therein are listed on the documents herein attached and form a part hereof; and are shown with reference to their location as to the lands affected on the plat attached hereto and made a part hereof; further, that said real estate is located in Iowa City, Johnson County, Iowa.

4. That the City of Iowa City has been unable to secure the described rights and land by purchase and conveyance.

5. That the land sought to be condemned is agricultural property and that such land is classified as Class II land under the United States Department of Agriculture soil conservation service land capability classification system; further, that said Class II land is reasonably necessary for the work of internal improvement for which condemnation is sought.

WHEREFORE, CITY respectfully requests that appointments be made of a Compensation Commission to assess damages as provided in Chapter 472, Code of Iowa (1985).

Dated this 5th day of August, 1986.

CITY OF IOWA CITY, IOWA

By: /s/ David E. Brown
DAVID E. BROWN
Assistant City Attorney
410 E. Washington St.
Iowa City, Iowa 52240
356-5033

Filed in my office in Linn County, Iowa, this 6th day of August 1986.

/s/ August F. Honsell
AUGUST F. HONSELL
Chief Judge
Sixth Judicial District
of Iowa

PARCEL INFORMATION SHEET

IN THE MATTER OF THE CONDEMNATION OF CERTAIN LAND AND PROPERTY RIGHTS BY THE CITY OF IOWA CITY, IOWA, FOR THE USE AND BENEFIT OF THE CITY OF IOWA CITY, IOWA, PURSUANT TO CHAPTER 471 OF THE CODE OF IOWA (1985), FOR THE RUNWAY 6-24 EXTENSION PROJECT AT THE IOWA CITY MUNICIPAL AIRPORT, ON LAND DESCRIBED IN THE EXHIBITS ATTACHED HERETO AND MADE A PART HEREOF: ALL SUCH LAND LOCATED IN IOWA CITY, JOHNSON COUNTY, IOWA.

---

1. Condemnation of fee simple absolute title is sought of the following described real estate:

That part of the NE 1/4 of the NE 1/4 of Section 20, Township 79 North, Range 6 West, lying southeasterly of present State Highway No. 1, westerly of the original State Highway No. 1, and northeasterly of the county road, in Johnson County, Iowa, described as follows:

Commencing at the NE corner of said Section 20; thence S 01°45′ W along the East line of said NE 1/4 a distance of 743.0 feet to a point on the southeasterly right-of-way line of present State Highway No. 1; thence S 38°04′ W along said right-of-way line 261.5 feet; thence S 24°59′30″ E along said right-of-way line 102.0 feet; thence N 36°18′ W along said rightof-way line 87.3 feet; thence S 11°59′ W along said right-of-way line 67.0 feet to a point on the centerline of the county road; thence S 36°18′ E along said centerline 85.9 feet to the beginning of a tangent curve to the right; said curve having a radius of 572.96 feet; thence southeasterly along said curve on said cen-

terline 215.1 feet through a central angle of 21°30′50″ to a point on the centerline curve of said original State Highway No. 1; said curves not being tangent; thence northerly along the second curve 165.4 feet on the center line of said original State Highway No. 1, said second curve having a chord bearing N 10°01′ E, a radius of 572.96 feet, and concave Westerly, through a central angle of 16°32′15″ to the point of tangency on the said East line of the NE 1/4; thence N 01°45′ E along said East line on said center line of original State Highway No. 1 a distance of 393.6 feet to the point of beginning. Containing 1.18 acres, more or less. Subject to the county road and easements of record. For the purpose of this description, the East line of the NE 1/4 is assumed to bear S 01°45′ W.

Attached hereto and made a part hereof by this reference is a plat showing the parcel of real estate sought for condemnation (see attached Exhibit A).

2. *Record Title Vested in*: Dean A. Fitzgarrald and Phyllis Fitzgarrald

Easements:

a) Easement in favor of Johnson County, Iowa, for road purposes as recorded in Book 136, page 32. b) Easement in favor of the State of Iowa, for road purposes, as recorded in Book 180, page 197. c) Easement in favor of Iowa-Illinois Gas and Electric Company over a certain 20 foot strip, as recorded in Book 230, page 202. d) Easement in favor of Iowa-Illinois Gas and Electric Company over a twenty foot strip, as recorded in Book 337, page 218.

Mortgages and Lienholders: None

Other matters affecting title:

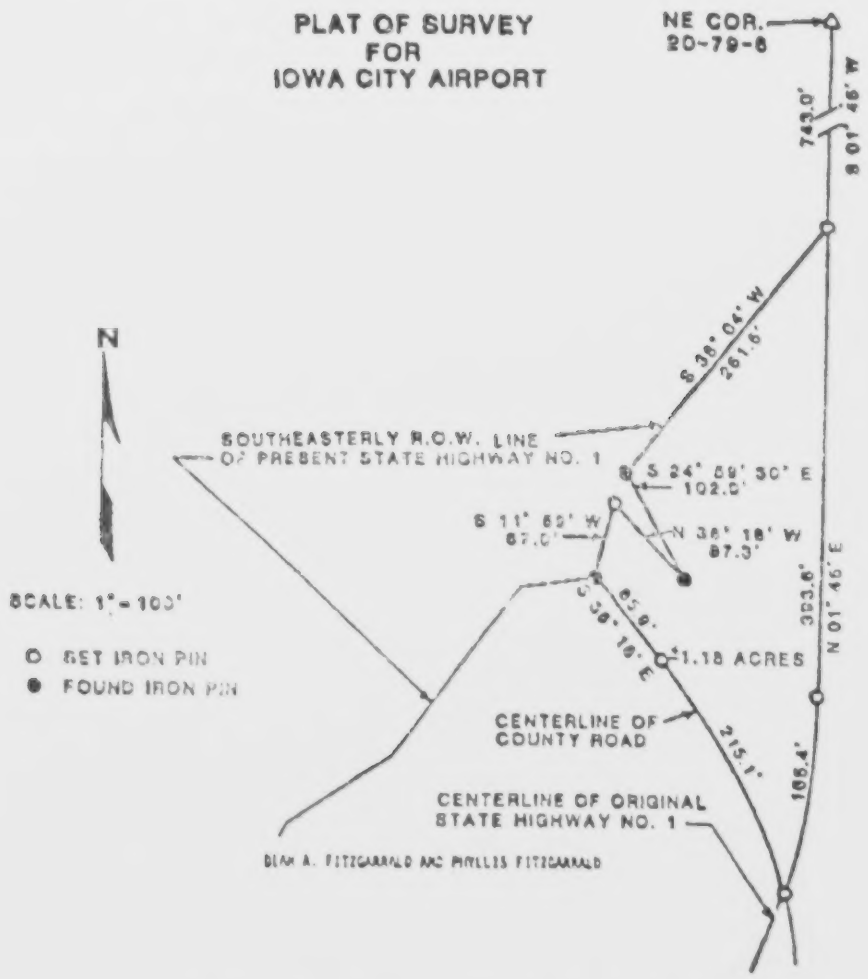
Judgment entered for traffic violator in favor of the State of Iowa against Phyllis F. Fitzgarrald on September 2, 1983, in the amount of $54.00, plus $6.00 court costs.

Texas:

Johnson County, Iowa
c/o County Auditor
Johnson County Courthouse
Iowa City, Iowa 52240

Tax Liens: None

Parcel Information Sheet—Page 2 of 2
City of Iowa City, Iowa, Applicant
Fitzgarrald Parcel



That part of the NE 1/4 of the NE 1/4 of Section 20, Township 79 North, Range 6 West, lying southwesterly of present State Highway No. 1, westerly of the original State Highway No. 1, and northeasterly of the county road, in Johnson County, Iowa, described as follows:

Commencing at the NE corner of said Section 20; thence S 01°48′ W along the East line of said NE 1/4 a distance of 743.0 feet to a point on the southeasterly right-of-way line of present State Highway No. 1; thence

S 38°04′ W along said right-of-way line 281.5 feet; thence S 24°69′30″ E along said right-of-way line 102.0 feet; thence N 36°18′ W along said right-of-way line 87.3 feet; thence S 11°59′ W along said right-of-way line 67.0 feet to a point on the centerline of the county road; thence S 38°18′ E along said centerline 85.9 feet to the beginning of a tangent curve to the right; said curve having a radius of 672.96 feet; thence southeasterly along said curve on said centerline 215.1 feet through a central angle of 21° 30′50″ to a point on the centerline curve of said original State Highway No. 1; said curves not being tangent; thence northerly along the second curve 165.4 feet on the centerline of said original State Highway No. 1, said second curve having a chord bearing N 10°01′ E, a radius of 572.95 feet, and concave Westerly, through a central angle of 16°32′15″ to the point of tangency on the said East line of the NE 1/4, thence N 01°45′ E along said last line on said centerline of original State Highway No. 1 a distance of 393.6 feet to the point of beginning. Containing 1.18 acres, more or less. Subject to the county road assessments of record. For the purpose of this description the last line of the NE 1/4 is assumed to bear S 01°45′ W.

I hereby certify that this Map, Plat, Survey or Report was made by me or under my direct personal supervision and that I am a duly registered land surveyor under the laws of the State of Iowa.

FEBRUARY 21, 1985 — Donald E. Pullett, D.S.

Date

DONALD E. PULLETT
Iowa Registrator

SELECTION AND APPOINTMENT OF COMPENSATION COMMISSION BY THE CHIEF JUDGE OF THE SIXTH JUDICIAL DISTRICT

IN THE MATTER OF THE CONDEMNATION OF CERTAIN LAND AND PROPERTY RIGHTS BY THE CITY OF IOWA CITY, IOWA, FOR THE USE AND BENEFIT OF THE CITY OF IOWA CITY, IOWA, PURSUANT TO CHAPTER 471 OF THE CODE OF IOWA (1985), FOR THE RUNWAY 6-24 EXTENSION PROJECT AT THE IOWA CITY MUNICIPAL AIRPORT, ON LAND DESCRIBED IN THE EXHIBITS ATTACHED HERETO AND MADE A PART HEREOF: ALL SUCH LAND LOCATED IN IOWA CITY, JOHNSON COUNTY, IOWA.

An Application for Condemnation having been filed with me by the City of Iowa City, Iowa, for the selection and appointment, by lot, of six suitable persons as the law provides to act as a compensation commission to assess and appraise the damages sustained by reason of the condemnation of certain specified rights in certain land described by Applicant, in its Application filed in the above matter, I hereby designate, select, and appoint as the members of the said compensation commission required in this matter the following persons:

Name	Address	Qualifications
Robert Carran Sr.	Iowa City	Licensed Real Estate Salesman or Broker
David Cozine	Iowa City	Licensed Real Estate Salesman or Broker
Rick Anderson	Iowa City	Knowledgeable of Property Values by Virtue of Occupation
Kenny O'Donnell	Iowa City	Knowledgeable of Property Values by Virtue of Occupation
Robert Lenz	Iowa City	Owner-Operator of Agricultural Property
Lillian Rohert	Oxford, Iowa	Owner-Operator of Agricultural Property

I further designate, select, and appoint, the above named Robert Carran Sr. to act as Chairman of said Commission.

TO THE SHERIFF OF JOHNSON COUNTY, IOWA; Attached hereto please find a duplicate of the Application for Condemnation in the above entitled matter.

Dated at Cedar Rapids, Iowa, this 6th day of August, 1985.

/s/ August F. Honsell
AUGUST F. HONSELL
Chief Judge of the Sixth Judicial District, including Johnson County, Iowa

Filed in my office at Iowa City, Iowa, this —— day of ————, 1986.

GARY HUGHES
Sheriff of Johnson County, Iowa

SUPPLEMENTARY ORDER APPOINTING ALTERNATE COMPENSATION COMMISSIONERS

IN THE MATTER OF THE CONDEMNATION OF CERTAIN LAND AND PROPERTY RIGHTS BY THE CITY OF IOWA CITY, IOWA, FOR THE USE AND BENEFIT OF THE CITY OF IOWA CITY, IOWA, PURSUANT TO CHAPTER 471 OF THE CODE OF IOWA (1985), FOR THE RUNWAY 6-24 EXTENSION PROJECT AT THE IOWA CITY MUNICIPAL AIRPORT, ON LAND DESCRIBED IN THE EXHIBITS ATTACHED HERETO AND MADE A PART HEREOF: ALL SUCH LAND LOCATED IN IOWA CITY, JOHNSON COUNTY, IOWA.

An Application for Condemnation having been filed with me by the City of Iowa City, Iowa, entitled as above, for the selection and appointment, by lot, of a duly constituted compensation commission, said selection and appointment having been made by me, I further appoint the folowing persons to serve as alternate members of said compensation commission, in the event that any of the said members having the same qualifications are unable to serve for any reason.

Name	Address	Qualifications
Gary L. Fink	Iowa City	Licensed Real Estate Salesman or Broker
Bernie Green	Iowa City	Knowledgeable of Property Values by Virtue of Occupation
Dan Black	Oxford, Iowa	Owner-Operator of Agricultural Property

The Sheriff of Johnson County, Iowa, shall upon being informed of a vacancy in the compensation commission, notify the alternate member appointed having the same qualifications as the person unable to serve in the same manner as the original commissioners were notified.

Dated at Cedar Rapids, Iowa, this 6th day of August, 1986.

/s/ August F. Honsell
AUGUST F. HONSELL
Chief Judge of the Sixth Judicial District, including Johnson County, Iowa

Filed in my office at Iowa City, Iowa, this —— day of ————————, 1986.

GARY HUGHES
Sheriff of Johnson County, Iowa

APPLICANT'S CERTIFICATION THAT ITS APPLICATION FOR CONDEMNATION HAS BEEN APPROVED BY THE CHIEF JUDGE

IN THE MATTER OF THE CONDEMNATION OF CERTAIN LAND AND PROPERTY RIGHTS BY THE CITY OF IOWA CITY, IOWA, PURSUANT TO CHAPTER 471 OF THE CODE OF IOWA (1985), FOR THE RUNWAY 6-24 EXTENSION PROJECT AT THE IOWA CITY MUNICIPAL AIRPORT, ON LAND DESCRIBED IN THE EXHIBITS ATTACHED HERETO AND MADE A PART HEREOF: ALL SUCH LAND LOCATED IN IOWA CITY, JOHNSON COUNTY, IOWA.

COMES NOW, the City of Iowa City, Iowa, by and through its attorney, David E. Brown, Assistant City Attorney, and hereby certifies that the attached Application for Condemnation has been approved by the Chief Judge and that a compensation commission has been appointed.

CITY OF IOWA CITY

By: /s/ David E. Brown
DAVID E. BROWN
Assistant City Attorney
410 E. Washington St.
Iowa City, Iowa 52240

EXHIBIT "C"

IN THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY

No. ———

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Plaintiffs,

vs.

THE CITY OF IOWA CITY, IOWA,
Defendant.

AFFIDAVIT FOR ATTORNEY'S FEES

STATE OF IOWA)
) ss:
COUNTY OF JOHNSON)

I, William L. Meardon, being first duly sworn on this 15th day of December, 1986, upon my oath depose and state that I am the attorney who filed the Petition for Writ of Mandamus to which this Affidavit is attached and there has been no agreement between me, this law firm, and the Defendant, express or implied, nor between me and this law firm or any other person for any division or share of the fee to be taxed as a result of the events alleged in the above-entitled matter, any such fees when taxed to be in favor of Meardson, Sueppel, Downer & Hayes as compensation for services actually performed in this action.

/s/ William L. Meardon
WILLIAM L. MEARDON

Subscribed and sworn to before me by William L. Meardon on this 15th day of December, 1986.

/s/ Staci E. Haynes
STACI E. HAYNES
Notary Public in and
for the State of Iowa

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

No. 50400

DEAN A. FITZGARRALD AND PHYLLIS FITZGARRALD,
Plaintiffs,

vs.

THE CITY OF IOWA CITY, IOWA,
Defendant.

MOTION FOR LEAVE TO AMEND

Plaintiffs ask leave of Court to amend their Petition for Writ of Mandamus as more particularly described in the amendment attached hereto as Exhibit "A" and by this reference made a part hereof. Plaintiffs further state as gounds for this motion:

1. Plaintiffs at their own substantial expense have recently obtained a topographical survey of their property.

2. Plaintiffs have retained an engineer in an attempt to ascertain the impact of the 34:1 glide slope upon their entire property and are now advised that their entire property has been severely and detrimentally affected by Defendant's action.

3. Plaintiffs are entitled to just compensation for a "taking" involving their entire property as opposed to that portion of Plaintiffs' property that Defendant purports to acquire by condemnation.

By reason of the foregoing, Plaintiffs ask that the Court approve this motion and that the attached amendment

to Plaintiffs' petition be considered as having been filed upon Court approval of this motion.

MEARDON, SUEPPEL,
DOWNER & HAYES

By: /s/ William L. Meardon
WILLIAM L. MEARDON
122 South Linn Street
Iowa City, Iowa 52240
Telephone: 319/339-9222
Attorneys for Plaintiffs

Copy to:

David E. Brown
Hayek, Hayek, Hayek & Holland
Bremer Building
120-1/2 East Washington Street
Iowa City, Iowa 52240

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

No. 50400

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Plaintiffs,

vs.

THE CITY OF IOWA CITY, IOWA,
Plaintiffs,

AMENDMENT TO PETITION FOR WRIT OF MANDAMUS

Plaintiffs having obtained leave of Court amend their petition as follows:

1. By adding thereto the following:

   15. The enactment by the Defendant of the 34:1 approach slope for Runway 6 together with Defendant's condemnation proceedings now on file constitute a taking of Plaintiffs' entire property not limited to the avigation easement sought by Defendant through condemnatory proceedings.

   16. The action of the Defendant in adopting the approach slope ordinance and increasing the length of Runway 6 as well as the enactment of a "clear zone" encompassing all but slightly more than 7,000 square feet of Plaintiffs' property constitutes a "taking" of Plaintiffs' property rights over their entire property for which Plaintiffs are entitled to compensation under the Fifth and Fourteenth Amendments of the Constitution of the United States and Section

18 of Article 1 of the Constitution of the State of Iowa.

17. The conduct of the Defendant in enacting the ordinances referred to above was taken without proper investigation of or concern for the property interests of the Plaintiffs."

2. By deleting the existing prayer of Plaintiffs' petition now on file and inserting in lieu thereof the following:

"By reason of the foregoing, Plaintiffs ask that a writ of mandamus issue commanding the Defendant to forthwith institute condemnation procedures to acquire an avigation easement over Plaintiffs' entire property except for that portion thereof being acquired in fee (1.18 acres) rather than the avigation easement which Defendant seeks over only a portion of Plaintiffs' property as proposed by the Defendant, and that the Plaintiffs be granted further auxiliary relief as may be proper and Defendant be ordered to pay the costs of this action including a reasonable attorney's fee (Exhibit "C" attached to the original petition is made a part hereof)."

MEARDON, SUEPPEL,
DOWNER & HAYES

By: /s/ Wiliiam L. Meardon
WILLIAM L. MEARDON
122 South Linn Street
Iowa City, Iowa 52240
Telephone: 319/338-9222
Attorney for Plaintiffs

Copy to:

David E. Brown
Hayek, Hayek, Hayek & Holland
Bremer Building
120-1/2 East Washington Street
Iowa City, Iowa 52240

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

No. 50400

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Plaintiffs,

vs.

THE CITY OF IOWA CITY, IOWA,
Defendant.

RULING

[Filed Nov. 1, 1990]

Trial was held on August 7 and 8, 1990. Plaintiffs, Phyllis and Dean Fitzgarrald, were represented by William Meardon. The City of Iowa City was represented by David Brown. Johnson County was represented by Patrick White. This case concerns the airport zoning ordinance and a subsequent amendment to it promulgated by Iowa City and Johnson County. For the purpose of this opinion, the City and County will be jointly referred to as "Municipality". The Iowa City Airport has three runways; however, only one of these runways affects the Fitzgarrald property. This is runway number 6 and unless otherwise specifically noted in this opinion, the term runway refers to number 6.

FACTS

The Fitzgarralds own a tract of land to the southwest of Iowa City. To their southwest lies the Iowa City Municipal Airport. When the Fitzgarralds purchased their property in the late 1940s, the airport was already in existence and operating. Besides the Plaintiffs' home,

they operate a mobile home court on the land in issue. Prior to the airport zoning ordinance (effective 1984), the Fitzgarralds operated the mobile home court as a nonconforming use to the then existing county zoning ordinance. In the late 1970s, the Fitzgarralds applied to the County Board of Adjustment for permission to build a motel on their property. Their resquest was denied. They have not attempted to make any other use of their property since that time to the present.

In 1984, the municipality enacted the airport zoning ordinance. It provided, among other things, for a "clear zone" at the end of the runway. The Fitzgarrald property is in the clear zone. The clear zone takes into account the need for aircraft not to have obstructions in their path while taking off or landing. There are height restrictions in this zone based on a 34 to 1 ratio; that is, the need to have one foot of elevation for every horizontal 34 feet from the end of the runway. The 1984 ordinance placed these height restrictions on the Plaintiffs' property (among others) based on a proposed runway extension of 1,000 feet from the old runway. This was done in anticipation of lengthening the runway to allow for particular instrument flight. Under the 1984 restrictions, the Plaintiffs' home, as well as a number of mobile homes in their court, were above the 34 to 1 measurement and constituted obstructions within the clear zone. The 1,000 foot extension was never completed. An extension of 355 feet from the existing runway was added, and in 1990, the municipality amended its ordinance to coincide with the fact that the runway would not be extended beyond 355 feet. This reduced the number of structures on the Fitzgarrald property which were obstructions within the clear zone. Prior to the airport zoning ordinance, the Fitzgarrald property had been zoned as residential. Their use of the property as a mobile home court was allowed to continue as a nonconforming use. There was no amortization clause in the ordinance which required its termination following a specific period

of time and the nonconforming use may continue indefinitely.

Prior to the enactment of the airport zoning ordinance, there were federal restrictions on clear zone property (such as Fitzgarralds) as the result of Federal Aeronautics Administration rules and regulations. The FAA made it clear to local authorities that local zoning ordinances should be promulgated to conform with federal regulations. Subsequently, the municipality enacted the 1984 airport zoning ordinance to do exactly that. Among the proscribed uses to which property such as Fitzgarralds could be put under the federal regulations were uses where there would be congregations of people. The municipality attempted to list specific uses where people might congregate and prohibit such uses by the ordinance. In seeking FAA approval of its ordinance, the municipality believed it needed to condemn an avigation easement over Fitzgarralds' land. Thus, it began condemnation proceedings for two such easements. The Fitzgarralds contested the condemnation proceedings, and they were subsequently ruled invalid by the Iowa District Court. In the meantime, the FAA approved the municipal ordinance and deemed it satisfactory without the condemnation of an avigation easement. Having FAA approval, the municipality abandoned the condemnation proceedings.

The 1984 ordinance provided for an Airport Board of Adjustment to determine whether or not exceptions or variances could be allowed under the ordinance. Fitzgarralds did not use this procedure to seek any relief from the ordinance. This is because the Fitzgarralds have not attempted or intended to do anything differently with their property. When the 1990 amendment was passed, it reduced the height restrictions affecting the Fitzgarrald property and also provided that it would not be necessary to seek a variance or exception through a local Board of Adjustment if the FAA gave approval of a use landowners requested for their property. The munici-

pal airport zoning ordinance was drafted to conform to FAA regulations. Landowners, such as the Fitgarralds, who were located off of the end of a runway, could not use their property in a manner prohibited by the FAA. That is, even if the municipal airport zoning ordinance had not been enacted, the Fitzgarralds would have to have FAA approval before they could alter the use of their property. The airport zoning ordinance merely assimilated the FAA restrictions into a municipal code and did not tighten the restrictions on the Fitzgarrald property any more than was already done by the FAA regulations.

Although the Fitzgarralds believe the extension of the runway by 355 feet has resulted in increased air traffic, the record indicates otherwise. The runway is not the most heavily used runway due to its direction. Prevailing winds in the Iowa City/Johnson County area are from the northwest and runway 6 is not used under such wind conditions.

The FAA has promulgated for the safe operation of airports and air traffic. In doing so, it has limited the use to which people, who reside near airports, may make of their property. These regulations clearly provide for the safety of persons who occupy land near airports as well as for the pilots and passengers who are flying and/or taking off from municipal airports.

In short, the Fitzgarralds purchased their property when the airport was in existence and situated immediately next to them. They began their business as mobile home court operators prior to the enactment of the airport zoning ordinance and have been able to continue that use up to the present time. They are able to continue that use into the indefinite future. They have not intended or attempted to change the use of their property since the enactment of the airport zoning ordinance. The ordinance(s) have not had an effect on their property

and have not placed any more restrictions on their land than was already in place by the FAA.

CONCLUSIONS OF LAW

A mandamus action is a recognized vehicle to compel condemnation proceedings when there has been a taking of private property for public use without compensating the owners. *Hammer v County of Ida*, 231 N.W. 2d 896, 902 (Iowa 1975). The "taking" doctrine is based on the constitutional principle that government cannot take private property for public use without paying just compensation. Iowa Const., art. I, Section 18.

The issue in this case is whether or not the municipality's promulgation of the airport zoning ordinance in 1984 and/or the amendment to it in 1990 takes Fitzgarrald's property for public use without just compensation. As noted in the court's Findings of Fact, there have been few, if any, restrictions placed on Fitzgarrald's property by the municipality because the property was already regulated under FAA rules and regulations. A "taking" which would require the municipality to proceed under eminent domain does not require the appropriation of a fee interest but it does require that the landowners be substantially deprived of the use and enjoyment of their property. *Osborn v City of Cedar Rapids*, 324 N.W. 2d 471 (Iowa 1982). Diminution in value of land by virtue of governmental action, standing alone, does not establish constitutional "taking" of the land. *Scott v City of Sioux City, Iowa*, 736 F. 2d 1207, cert. denied, 471 U.S. 1003 (C.A. Iowa 1984). The municipality's use of its eminent domain power involves taking property for public use, thus requiring just compensation, whereas zoning ordinances involve control and regulation of private property for public good and may be exercised without payment of compensation. See *Easter Lake Estates, Inc. v Polk County*, 444 N.W. 2d 72 (Iowa 1989). Only if the use of police power substantially deprives the owner of the

property's use and enjoyment is there a compensable taking. *Id.* at 75-6. In determining whether or not there has been a "taking" as opposed to a regulation and restriction of use, the court must weigh the legitimate interests of the private property owner and the government. The "vested rights concept" is part of the balancing of the respective interests of the property owner against those of the general public. *Kasparek v Johnson County Board of Health*, 288 N.W. 2d 511, 518 (Iowa 1980). That is, a zoning restriction on real property may constitute a "taking" if it has an unduly harsh impact on the owner's use of the property. *Id.* at 517-8: In this case, the Fitzgarralds' use of the land has continued without interruption or disruption for many years prior to and subsequent to the enactment of the airport zoning ordinance. The court considers the fact that the Plaintiffs are not losing their "vested rights" by virtue of the zoning regulations. There has been no taking of the substantial use and enjoyment of the property by the municipality. As such, the zoning ordinance is not so oppressive that it results in a "taking". See *Woodbury County Soil Conservation Dist. v Ortner*, 279 N.W. 2d 276 (Iowa 1979). A property owner does not necessarily have a remedy for compensation if a zoning regulation merely deprives the owner of the most beneficial use of his or her property. *Kempf v City of Iowa City*, 402 N.W. 2d 393 (Iowa 1987). While there are occasions where frustration of investment-backed expectations may amount to a "taking", there is no evidence of any such expectation in the case at bar. See *Agins v City of Tiburon*, 447 U.S. 255 (198). Zoning restrictions, when justifiable under the police power, validly enacted and not unreasonable, are generally held not to be a "taking" of the property for public use without compensation. *Stone v City of Wilton*, 331 N.W. 2d 398, 402 (Iowa 1983). The court concludes the airport zoning ordinances in issue are a valid exercise of police power by Iowa City and Johnson County and do not amount to a "taking" which would require the con-

demnation of a avigation easement over Plaintiffs' property. This is based on the following capsulated list of reasons:

1. The use the Fitzgarralds made of their property before the enactment of the airport zoning ordinances continues to be allowed after the enactment of the airport zoning ordinances.

2. The airport was in existence when the Fitzgarralds purchased the property.

3. Plaintiffs have not contemplated a change in the use of their property since the enactment of the ordinances in issue.

4. The FAA, in fact, controls the uses to which the property may be put.

5. Iowa City and Johnson County have merely conformed to FAA regulations and the airport zoning ordinance(s) is no more restrictive than the federal restrictions.

6. Variances and exceptions to the federal and municipality restrictions are possible.

7. There has been no greater imposition on the Fitzgarralds' property by the 355 foot extension of the runway.

Based on the foregoing Findings of Fact and Conclusions of Law, the court determines that there has been no "taking" which would require the exercise of eminent domain, and the Plaintiffs' petition for mandamus is denied. Costs are assessed to the Plaintiffs.

Dated this 31 day of October, 1990.

/s/ L. Vern Robinson
L. VERN ROBINSON
Judge
6th Judicial District

IN THE COURT OF APPEALS OF IOWA

No. 1-436/90-1845

[Filed Dec. 31, 1991]

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Appellants,

vs.

THE CITY OF IOWA CITY, IOWA and
JOHNSON COUNTY, IOWA,
Appellees.

Appeal from the Iowa District Court for Johnson County
L. Vern Robinson, Judge

Plaintiffs appeal the district court denial of mandamus relief. WRIT DENIED.

William L. Meardon of Meardon, Sueppel, Downer & Hayes, Iowa City, for appellants.

David E. Brown of Hayek, Hayek, Holland & Brown, Iowa City, for appellee City of Iowa City.

J. Patrick White, County Attorney, for appellee Johnson County.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Plaintiffs-appellants Dean A. Fitzgerald and Phyllis Fitzgarrald own ten acres of land immediately south of the Iowa City Municipal Airport. Iowa City enacted a zoning ordinance imposing height restrictions on plaintiffs' land. Plaintiffs contended the city in enacting the

ordinance took an easement across their property without compensating them for the taking. Plaintiffs filed a petition for a writ of mandamus to compel defendants-appellees City of Iowa City and County of Johnson to initiate eminent domain proceedings to condemn the airway. The trial court found there had not been a taking and denied plaintiffs relief.

Plaintiffs have appealed, contending (1) the zoning ordinance was a taking of their property, and (2) the city should be directed to condemn their property and pay them damages.

A mandamus is an equitable action, and our review is de novo. *Nowlin v. Scurr*, 331 N.W.2d 394, 396 (Iowa 1983); *Osborn v. City of Cedar Rapids*, 324 N.W.2d 471, 474 (Iowa 1982).

Plaintiffs purchased the ten-acre tract located in Johnson County and southwest of the corporate limits of Iowa City in the 1940s. The Iowa City Airport was operating at its current location. The plaintiffs' personal residence is located on the ten-acre tract, as is a mobile home park. Plaintiffs' property is zoned by Johnson County as residential. The mobile home park operates as a nonconforming use.

In 1984, Iowa City sought to expand the runway northeast of plaintiffs' property. Originally, the runway was to be extended 1,000 feet. Ultimately the runway was only extended 335 feet.

In 1984, Iowa City and Johnson County enacted "Airport Zoning," establishing airport overlay zones in which airport hazards and incompatible uses were prohibited. The ordinance which changed the restrictions on the use of plaintiffs' land provided for a clear zone at the end of the runway. The ordinance placed plaintiffs' entire ten-acre tract in the clear zone and provided for an approach slope of 34:1, meaning for every thirty-four feet horizontally from the end of the runway, the approach slope

is one foot vertically. Several mobile homes and the plaintiffs' personal residence were within the approach slope.

In 1987, when Iowa City was contemplating extending the runway 1,000 feet, they sought to condemn an aviation easement over 5.02 acres of plaintiffs' land. Plaintiffs moved to set aside or vacate the condemnation proceedings because the condemnation notice did not sufficiently describe what the city intended to condemn. On November 9, 1988, the trial court found the condemnation could include more than the acres included in the notice, the notice was jurisdictionally defective, and the proceeding was null and void.

The 1,000-foot extension was never completed, but the runway was extended 355 feet. Then, in 1990, the ordinance was amended to reduce the height restrictions affecting the plaintiffs' property. The amendment conformed to FAA regulations. After the condemnation was vacated, the city had decided it was not necessary to condemn to comply with FAA regulations, because they could comply with FAA regulations by zoning.

The plaintiffs then filed this action, contending the amendment to the 1990 ordinance constituted a taking.

The first issue is whether the 1990 zoning ordinance putting additional restrictions on the height of structures plaintiffs can build on their property was a taking without just compensation.

The plaintiffs introduced evidence that since the runway expansion the noise from air traffic has increased, mobile home park tenants have moved because of the noise, the noise vibrates items in their home, and during the fall of 1990, a large freight airplane in landing flew so low the pilot could be seen from beneath the awning of a second-floor window of their home.

Plaintiffs also produced evidence the height restrictions lowered the value of their property.

The defendants argue there was no taking because the plaintiffs are entitled to maintain the current uses of their property despite the restriction of the ordinance, the plaintiffs have made no application to develop their property for any other use or to perform any new construction, and plaintiffs have not sought a special exception or variance from the application of the airport zoning regulations.

I.

Plaintiffs contend the trial court should have found the restriction imposed on their property by the zoning ordinance was an easement in the airport's favor and defendant should be forced to pay for an easement at a price established through a condemnation.

There has been a distinction made between height restriction zoning, recognized as a valid exercise of police power, and air easements to protect the approaches to airports. *See* 13 Hastings Law Journal 397, *Airport Zoning and Height Restrictions.* There is a difference between interference with use and enjoyment of property by physical government activity and a regulation of property use through zoning. *See McShane v. City of Faribault*, 292 N.W.2d 253, 257 (Minn. 1980). Where a government activity causes a definite and measurable decrease in the value of a plaintiff's property and interferes with the current practical enjoyment of the property, a compensable taking may have occurred. *Id. See*, e.g. *Alevizons v. Metropolitan Airports Comm's*, 298 Mo. 471, 216 N.W.2d 651 (1974). Regulation that goes too far can be viewed as a taking. *See Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116, 87 L. Ed. 2d 126, 138 (1985). A public desire to improve public condition is not enough to warrant achieving the desire by a shorter cut rather than the constitutional way of paying for the change. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 395, 415-16, 43 S. Ct. 158, 160, 67 L. Ed. 322, 326 (1922); *Business*

Ventures, Inc. v. Iowa City, 234 N.W.2d 376, 382 (Iowa 1975).

A determination a governmental action constitutes a taking is a determination the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. *Agins v. Tiburon*, 447 U.S. 255, 262, 100 S. Ct. 2138, 2142, 65 L. Ed. 2d 106, 112 (1980). Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. *Id.* However, the right to use property as one wishes is subject to and limited by the proper exercise of police power in the regulation of land use. Regulation does not constitute a compensable taking unless it deprives the property owner of all reasonable use. *See McShane*, 292 N.W.2d at 257. Every landowner who is in some way limited or inconvenienced by such regulation is not necessarily entitled compensation.

Property owners cannot have the advantages of the convenience and be paid for the undesirable effects created by the convenience, unless the effects adversely affect his or her property so directly and so substantially that it is manifestly unfair to require them to sustain measurable loss in market value which the property-owning public in general does not suffer. *See McShane*, 292 N.W.2d at 259.

The ordinance here was not an ordinance arbitrating competing land uses. The ordinance was a regulation for the benefit of a governmental enterprise—the Iowa City Airport. Where the burden of governmental activity falls on persons such as the plaintiffs, and the public receives the advantage of the property rights without payment, there is support for the proposition the public should pay for the diminution in value. *See* Sax, *Takings and the Police Power*, 74 Yale L. Rev. 36 (1964); *Indiana Toll Road Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. dismissed*, 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965); *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963) (said while

height restriction zoning had been recognized as a valid exercise of police power, there was a reluctance to extend this reasoning to zoning for the protection of approaches to airports—instead air easements with payment of compensation appeared to be the more acceptable method of protecting approach zones); *Roark v. Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964) (public benefit in maintenance of unencumbered approaches to an airport not sufficient reason to justify uncompensated takings of private property). *See generally Thompson v. City of Osage*, 421 N.W.2d 529, 533 (Iowa 1988) (court citing *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84 (Iowa 1973), (court recognized the condemnation of clearance or obstruction easements to provide a clear zone approach to airports).

The trial court concluded there had been no taking. We disagree with the trial court and determine the ordinance as now written is a taking. Extensive and repeated low flying, caused annoyance to the plaintiffs. Such activities have been recognized as substantial interference with the enjoyment of property. *Anderson v. Souze*, 38 Cal. 2d 825, 243 P.2d 497 (1952).

Plaintiffs land is in a prime location for development. Any development will be substantially curtailed by the height restriction. The clearance is from a low of ten feet the the westerly side of plaintiffs' land to a high of thirty feet at the easterly side of their land. Plaintiffs' house penetrates the approach slope by 6.9 feet. The zoning ordinance does not benefit the plaintiffs as well as the public. *See Agins*, 447 U.S. at 262, 100 S. Ct. at 2142, 65 L. Ed. 2d at 113.

The regulation is so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. *See Williamson*, 473 U.S. at 199, 105 S. Ct. at 3123, 87 L. Ed. 2d at 147. The zoning regulations are so limiting as to constitute a taking.

II.

The second question is whether a writ of mandamus should issue. The granting to airport authorities of condemnation powers gives the airport authority the authority and the responsibility to acquire adequate easements. *See generally Greater Westchester Homeowners Ass'n v. Los Angeles*, 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979).

Defendants agree mandamus will lie to compel condemnation where there has been a taking of private property for public use within the constitutional sense without compensating the owners. *See Hammer v. County of Ida*, 231 N.W.2d 896, 902 (Iowa 1975). Mandamus is a summary and extraordinary writ, and it will be issued in doubtful cases, but only where the rights and duties are clear and there is no other speedy and adequate remedy in the ordinary course of the law. *Reed v. Gaylord*, 216 N.W.2d 327, 328 (Iowa 1974). Mandamus is a remedy to be applied only in exceptional circumstances. *See Hewitt v. Ryan*, 356 N.W.2d 230, 233 (Iowa 1984).

A claim that the application of government regulations effects a taking of a property interest is not ripe until the government charged with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue. *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3116, 87 L. Ed. at 139; *Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264, 296, 101 S. Ct. 2352, 2370, 69 L. Ed. 2d 1, 28, (1981).

Furthermore, plaintiffs have not sought to change the use of the property. The city advances the zoning ordinance provides for variances. The matter is not ripe until a variance has been denied. The city also has the authority to repeal or modify the ordinance. The trial court was correct in dismissing plaintiffs' action.

Costs on appeal are taxed one-half to each party.

WRIT DENIED.

IN THE SUPREME COURT OF IOWA

No. 90-1845

Johnson County No. 50400

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Plaintiffs-Appellants,

vs.

CITY OF IOWA CITY, IOWA and
JOHNSON COUNTY, IOWA,
Defendants-Appellees.

ORDER

[Filed Jan. 27, 1992]

The application(s) for further review and any resistance(s) filed in the above-captioned case are hereby set for consideration by this court without oral argument on Friday, February 28, 1992.

Dated this 27th day of January, 1992.

THE SUPREME COURT OF IOWA

By s/ Arthur A. McGiverin
Chief Justice

IN THE SUPREME COURT OF IOWA

No. 90-1845

Johnson County No. 50400

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Plaintiffs-Appellants,

vs.

CITY OF IOWA CITY, IOWA and
JOHNSON COUNTY, IOWA,
Defendants-Appellees.

ORDER

[Filed Feb. 28, 1992]

After consideration by this court en banc, further review of the above-captioned case is hereby granted.

The issues presented for review will be submitted to a division of this court during the week beginning April 6, 1992. The parties will be notified of the date and time of submission about one month in advance.

The court will consider the previously filed papers. No supplemental briefs will be required.

The parties will be heard in oral argument as follows:

Plaintiffs—15 minutes
Defendants—15 minutes
Plaintiffs' reply—5 minutes.

Dated this 28th day of February, 1992.

THE SUPREME COURT OF IOWA

By /s/ Arthur A. McGiverin
ARTHUR A. MCGIVERIN
Chief Justice

IN THE SUPREME COURT OF IOWA

No. 90-1845

Johnson County No. 50400

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD
Plaintiffs-Appellants,

vs.

THE CITY OF IOWA CITY, IOWA,
Defendant-Appellee.

ORDER

[Filed Apr. 3, 1992]

Plaintiffs-appeallants' application for limited remand shall be submitted with the appeal.

The parties may present arguments on the application at their oral arguments scheduled for April 6, 1992.

Dated this 2rd day of April, 1992.

/s/ Arthur A. McGiverin
ARTHUR A. MCGIVERIN
Justice
Supreme Court of Iowa

IN THE SUPREME COURT OF IOWA

No. 141/90-1845
Filed June 17, 1992

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD
Appellants,

vs.

CITY OF IOWA CITY, IOWA and
JOHNSON COUNTY, IOWA,
Appellees.

On review from the Iowa Court of Appeals

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Landowners adjacent to municipal airport appeal from adverse judgment in mandamus action to compel condemnation. The court of appeals reversed. DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.

William L. Meardon of Meardon, Sueppel, Downer & Hayes, Iowa City, for appellants.

David E. Brown of Hayek, Hayek, Holland & Brown, Iowa City, for appellee City of Iowa City.

J. Patrick White, County Attorney, and Karen Lorenzen, Legal Intern, for appellee Johnson County.

Considered by McGiverin, C.J., and Carter, Neuman, Snell, and Andreasen, JJ.

CARTER, J.

Plaintiffs, Dean Fitzgarrald and Phyllis Fitzgarrald, who are landowners adjacent to the Iowa City Municipal Airport, appeal from adverse judgment in mandamus action to compel condemnation. The court of appeals concluded that a taking had occurred but that plaintiffs had not shown exhaustion of administrative remedies under the "variance" provisions of the ordinance. We granted further review of the court of appeals decision. After reviewing the record and hearing the arguments presented, we vacate the decision of the court of appeals and affirm the judgment of the district court.

Plaintiffs own approximately ten acres of land adjacent to the southwest portion of the Iowa City Municipal Airport. The airport was in operation at the same location when plaintiffs purchased the property sometime in the 1940s. Throughout their ownership of this property, plaintiffs have resided in a dwelling located on the premises. In addition, they have operated a mobile home park on the property.

The property was zoned as residential subsequent to plaintiffs' purchase thereof, and the mobile home park operation has continued as a nonconforming use under that zoning classification. Plaintiffs have attempted to secure rezoning of the property so as to permit other commercial uses, but those efforts have proved unsuccessful. The most recent unsuccessful attempt to rezone the property was in 1978 when plaintiffs applied to Johnson County for rezoning to permit a motel operation.

Plaintiffs' property is located at the end of airport runway 6-24. In November 1984, the Iowa City Airport Commission undertook a project designated as "Runway 6-24 Extension Project." This project contemplated that runway 6-24 would be extended 1000 feet toward plaintiffs' property. The extension required the taking of 1.18 acres of plaintiffs' land. To help facilitate this project, the City of Iowa City and Johnson County in

1984 jointly adopted a zoning ordinance prescribing height and use restrictions for property surrounding the airport.

The 1984 ordinance proscribed structures from penetrating an "Approach Overlay Zone," which is a plane beginning 200 feet from the end of a runway and extending skyward at a slope of thirty-four horizontal feet to one vertical foot (34:1 slope). This "approach slope" for the proposed 1000-foot extension of runway 6-24 penetrated the plaintiffs' home and some of their ground. Preexisting structures that did not conform to the ordinance were permitted to remain without alteration as nonconforming uses.

The ordinance also provided for a "Clear Overlay Zone," which places resrictions on uses for property located beneath it. Plaintiffs' property is within the clear zone. The ordinance provides:

> Use limitations. No use shall be permitted in the OCL Zone in which there is connected therewith a building which according to the 1982 edition of the Uniform Building Code, has an occupancy rating of 50 square feet of floor area per person or less. In addition, the following uses shall not be permitted:
>
> (a) Campgrounds.
>
> (b) Fairgrounds.
>
> (c) Hospitals and institutions.
>
> (d) Motels and hotels.
>
> (e) Nursing and custodial home.
>
> (f) Residential uses.
>
> (g) Restaurants and similar eating and drinking establishments.
>
> (h) Sanitary landfills.
>
> (i) Schools, including nurseries, prekindergartens and kindergartens.

(j) Stadiums.

(k) Storage of fuel or other hazardous materials.

(l) Theaters.

Exceptions and variances from the use limitations may be allowed in some situations and a special board of adjustment has been established to consider such applications. To a large extent, the ordinance incorporated restrictions already contained in Federal Aviation Administration (FAA) regulations applicable to property surrounding the airport. *See* 14 C.F.R. part 77 (1984).

In August 1986, the city initiated an eminent domain proceeding to acquire 1.18 acres of plaintiffs' property in fee for the runway extension. The award in that proceeding is the subject of an appeal in a separate action not affecting the present litigation. In December 1986, plaintiffs filed a mandamus action demanding that the city also condemn an avigation easement to permit flights over their property.[1] In October 1987, prior to adjudication of the mandamus action, the city did initiate eminent domain proceedings to obtain such an easement. That action was ultimately voided by district court order as a result of a faulty description of the interests being condemned. No further action has been taken by the city to acquire an avigation easement over plaintiffs' lands.

Ultimately, runway 6-24 was only extended 355 feet instead of the 1000-foot extension originally contemplated. The 1984 zoning ordinance was amended to accommodate this change. The primary result of these amendments was to change the height restrictions of the ordinance to reflect the shorter runway. Under the amended ordinance, plaintiffs' dwelling penetrates 6.9 feet into the specified

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[1] In *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84, 87 (Iowa 1973)(we described an avigation easement as one that permits free flights over land including those so low and frequent as to amount to a taking of property.

approach slope. Like the 1984 ordinance, the amended ordinance allows plaintiffs' nonconforming uses to continue without alteration.

When the city failed to reinitiate the aborted attempt to condemn an avigation easement, plaintiffs again pressed their mandamus action. They also amended that action to allege that the zoning ordinances were so restrictive of property uses that they constitued a regulatory taking for which compensation was due plaintiffs.

After hearing the evidence presented at the trial of the mandamus action, the district court concluded that the ordinances do not constitute a compensable taking of plaintiffs' property. The court listed six reasons for reaching that conclusion: (1) the airport was in existence when plaintiffs purchased the property in the 1940s; (2) plaintiffs' use of their property before the enactment of the airport zoning ordinances continues to be permitted without alteration; (3) plaintiffs' mobile home operation was a nonconforming use under prior zoning ordinances and thus could not be substantially altered irrespective of the challenged airport zoning regulations; (4) plaintiffs have not contemplated a change in the use of their property since the enactment of the ordinance in issue; (5) in the absence of the local zoning ordinances, FAA regulations applicable to land use would impose substantially the same restrictions; and (6) variances and exceptions to the federal and municipal restrictions are possible.

The district court also considered and rejected plaintiffs' claim that an avigation easement must be condemned by the airport authority because of a direct physical invasion of plaintiffs' lands by overflying aircraft. This claim was based on allegations that unreasonable noise and vibrations were occurring because takeoffs and landings to and from the extended runway were now more proximate to plaintiffs' property. The court found the evidence that, in fact, there were fewer flights over

plaintiffs' lands after the runway extension was completed than there were before that project was initiated.[2] Other facts relevant to the case will be considered in our discussion of the legal issues that have been presented.

I. *The Regulatory Taking Issue.*

Mandamus is an equitable action. *Phelps v. Board of Supervisors*, 211 N.W.2d 274, 277 (Iowa 1973); Iowa Code § 661.3 (1985). Our review is thus de novo. Iowa R. App. P. 4. We must first consider whether the district court was correct in deciding the regulatory taking issue adversely to plaintiffs. Based on our de novo review of the evidence and application of the legal principles that we next discuss, we conclude that it was. The court of appeals erred in concluding otherwise.

Although action by the state or its political subdivisions pursuant to the police power and the power of eminent domain were once thought to be separate and compartmentalized powers that did not overlap, this view has now been largely abandoned. *See* 2 A. Gaudio, *The American Law of Real Property* § 17.05, at 87-102 (1991). We have recognized the "inevitable danger" to private property that would exist if the "just compensation" requirements of the fifth amendment to the federal Constitution and article I, section 18 of the Iowa Constitution could be circumvented through the guise of police power regulations. *Business Ventures, Inc. v. Iowa City*, 234 N.W.2d 376, 381-82 (Iowa 1975).

We have previousl yobserved that:

> [A] "taking" does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof. . . . [T]here has

[2] The court of appeals apparently found that the overflights were a sufficient invasion to constitute a taking separate and apart from the alleged regulatory taking.

> been a taking if, as plaintiffs contend, there has been a substantial interference with their use and enjoyment of their property . . . .

Phelps, 211 N.W.2d at 276 (citations omitted). Although not every policy power regulation that restricts some beneficial use of property creates a compensable taking, *see Stone v. City of Wilton*, 331 N.W.2d 398, 404 (Iowa 1983), the frustration of investment-backed expectations by zoning ordinances may constitute a taking for which compensation is due. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 112 (1980) (application of general zoning law to particular property affects a taking if it denies the economically viable use of the land); *Osborn v. City of Cedar Rapids*, 324 N.W.2d 471, 474 (Iowa 1982) (action taken for public good that places uncompensated burden upon plaintiff's property not shared by public at large may constitute taking); *Woodbury County Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276, 278 (Iowa 1979) (even exercise of police power may amount to taking if it deprives owner of substantial use and enjoyment of property).

We must test the ordinances upon which plaintiffs' "taking" claim is based against the legal principles we have just discussed. Arguably, these use restrictions are in several aspects so restrictive of beneficial property uses that a taking might be found to have occurred if the uses prescribed had otherwise been available to plaintiffs. We need not determine that issue, however, because, as the district court correctly found, most of the uses proscribed by the airport zoning ordinances enacted in 1984 and later amended had also been proscribed for many years under previous zoning ordinances and FAA regulations.

The uses that plaintiffs have previously made of this property are preserved to them under the challenged airport zoning ordinance as nonconforming uses. Moreover, plaintiffs have failed to demonstrate that, absent the chal-

lenged airport zoning ordinance, other feasible uses of the property would be available to them or to a potential buyer. To the extent plaintiffs have suggested other uses that might be made of their property, those suggested activities would be prohibited in any event under the property's basic residential zoning classification. Plaintiffs failed to show a reasonable likelihood of a change in that zoning classification. Given these circumstances, we are unable to conclude that the airport zoning ordinances upon which plaintiffs' "taking" claim is based have frustrated any investment-backed expectation for the use of their land. The district court's rejection of plaintiffs' regulatory taking claim was correct.

II. *The Physical Invasion Claim.*

Next, we take up the matter of plaintiffs' claim that overflying aircraft so adversely affects the use and enjoyment of their property that a taking has resulted. In this regard, we note the Supreme Court's admonition that

> [a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631, 648 (1978) (citation omitted). In some circumstances, overflying aircraft may amount to a physical invasion. *See United States v. Causby*, 328 U.S. 256, 261, 66 S. Ct. 1062, 1065, 90 L. Ed. 1206, 1210 (1946).

We tacitly recognized mandamus as a procedural device to compel condemnation of an avigation easement in *Dolezal*, 209 N.W.2d at 87-88. In that case, we recognized that an avigation easement may be required when flights are so low and so frequent as to amount to a tak-

ing of property. *Id.* at 87. Of course, every noise or interference with property as a result of overflying aircraft does not constitute a taking. Landowners must endure some level of inconvenience, discomfort, and loss of peace and quiet that can be reasonably anticipated by members of a progressive society. But, as the Minnesota court observed,

> when those interferences reach the point where they cause a measurable decrease in property market value, it is reasonable to assume that, considering the permanency of the air flights, a property right has been, if not "taken or destroyed," at the very least "damaged," for which our constitution requires that compensation be paid.

Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 486-87, 216 N.W.2d 651, 662 (1974). In such cases, the right to recovery is not for the nuisance that must be endured but for the loss of value that has resulted.

Although some courts have concluded that the issue of whether a taking has occurred in airport overflight cases is an issue of law for the mandamus court to decide in the first instance, *see, e.g., In re Ramsey*, 31 Pa. Commw. 182, 186, 375 A.2d 886, 888-89 (1977), we believe the better rule to be that mandamus court should only determine whether a factual issue exists that would permit a award to find an intrusion that produced a measurable decrease in the property's market value. The mandamus court may find the evidence insufficient as a matter of law to compel the summoning of a condemnation commission, but that court is simply not called upon to rule as a matter of law that a taking has occurred. To do so would create an undesirable issue preclusion problem in a later trial of a condemnation proceeding. It is for the condemnation commission or trial jury to fix the loss of value, if any, suffered by the property owner. *Phelps*, 211 N.W.2d at 276.

Ultimately, in determining whether there has been a substantial interference from overflying aircraft so as to constitute a taking, the inquiry focuses entirely on injury to market value. If such injury is in fact demonstrated, there is no de minimis rule. As a Washington court has observed,

> Therefore, the balance of interest inherently struck in this type of action comes about in the following manner. If the individual is unusually sensitive, and sustains a greater injury than might be suffered by the general public from such interference, the public interest in maintaining the flights leaves him to one remedy—to sell his property and move. This is no different than it would be had his land been condemned for forced sale to the state. But whichever way the state exacts such a "sale," it must pay the individual the amount he suffers in the diminishment of the value of his land . . . . Such lowering of market value reflects not the personal injury to the individual, but the lesser desirability of the land to the general public . . . .
>
> . . . [W]here there is only an injury of the extent such that it should be called or labeled "incidental," no measurable or provable decline in market value could be expected traceable to the flights. Recovery would not be forthcoming, but not because of some arbitrary rule set for convenience in administration of justice, but because of an inability to prove damages according to the common and well understood rules of suit. Second, and even more significant to the balancing problem, the smaller the provable decline in market value, the slighter the burden cast upon the public in paying for it. Surely the protection of the public interest does not entail the refusal of *small* claims on the ground that the burden to the public is not great enough to pay for!

Martin v. Port of Seattle, 65 Wash. 2d 309, 318, 391 P.2d 540, 546-47 (1964).

We accept plaintiffs' argument that, on their physical invasion claim, they were not required to try their eminent domain case in full in the mandamus action. They were only required to present enough evidence to generate a fact issue as to whether the overflying aircraft produced "a measurable decrease in property value." However, in reviewing the evidence presnted at trial, we find, as did the district court, that the evidence falls short in this regard.

Plaintiffs appear to have contended at one point in the litigation that the thirty-four horizontal feet to one vertical foot approach slope constitued the flight path of aircraft over their property on takeoffs and landings. The evidence reveals, however, that the approach slope is merely a clearance zone and bears no relationship to the actual altitude of planes over the land to which the approach slope applies. The record is devoid of any evidence showing either the frequency or approximate altitudes of planes flying over plaintiffs' lands.

Defendants presented evidence that planes were taking off and landing with approximately the same frequency and altitude before and after the runway extension. Three pilots who testified for defendants indicated that after the runway was extended they altered their approach turns to runway 6-24 so as to keep farther away from plaintiffs' property. Two of these pilots conceded, however, that planes landing on runway 6-24 would now pass over plaintiffs' lands at lower altitudes as a result of the 355-foot runway extension.

Although plaintiff Phyllis Fitzgarrald testified as to some inconvenience from airport noise, she did not fix the frequency of such occurrences nor indicate that this occurred on a regular basis. She testified that some tenants of the mobile home park had left after the runway was extended, but admitted that she had no personal knowledge as to the reason why. No other evidence was offered concerning loss of tenants at the park. Most sig-

nificantly, for purposes of plaintiffs' physical invasion claim, all of their loss-of-value evidence related to the regulatory taking claim that we have previously rejected. None of the witnesses at trial testified that overflying aircraft adversely affected the market value of plaintiffs' property. We conclude that there is a deficiency of proof as to the element of "measurable decrease in market value" due to overflying aircraft.

We have considered all issues presented and conclude that the decision of the court of appeals should be vacated and the judgment of the district court affirmed.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.

IN THE SUPREME COURT OF IOWA

No. 90-1845

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Plaintiffs-Appellants,

vs.

THE CITY OF IOWA CITY, IOWA and
JOHNSON COUNTY, IOWA,
Defendants-Appellees.

ORDER

[Filed Oct. 2, 1992]

Aftr the filing of our opinion in this appeal on June 17, 1992, the appellant filed a petition for rehearing. Pursuant to Iowa Rule of Appellate Procedure 27(a), we specifically requested that both appellees file a response to that petition.

After considering the issues presented in the petition for rehearing and the appellees' responses thereto, we hereby grant the petition for rehearing. The opinion filed in this case on June 17, 1992, which has not been published, is withdrawn.

The issues on further review of the court of appeals decision in this case will be resubmitted to this court, without oral argument, on Wednesday, October 14, 1992. This submission will be on the briefs and arguments previously filed by the parties and on the written arguments presented with respect to the petition for rehearing.

Dated this 2nd day of October, 1992.

SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin
ARTHUR A. MCGIVERIN
Chief Justice

IN THE SUPREME COURT OF IOWA

No. 90-1845

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Appellants,

vs.

THE CITY OF IOWA CITY, IOWA, and
JOHNSON COUNTY, IOWA,
Appellees.

ORDER

[Filed Dec. 23, 1992]

After consideration by the court, en banc, appellants' Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Dated this 23rd day of December, 1992.

THE SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin
ARTHUR A. MCGIVERN
Chief Justice

CITY OF IOWA CITY
Civic Center 410 E. Washington St.
Iowa City, Iowa 52240
(319) 356-5000

STATE OF IOWA)
) ss
JOHNSON COUNTY)

I, Marian K. Karr, City Clerk of the City of Iowa City, do hereby certify that the Ordinance attached hereto is a true and correct copy of the Ordinance No. 84-3211 which was passed by the City Council of Iowa City, Iowa, at a regular meeting held on the 6th day of November, 1986, all as the same appears of record in my office.

Dated at Iowa City, Iowa, this 6th day of August, 1990.

/s/ Marian K. Karr
MARIAN K. KARR
City Clerk

ORDINANCE NO. 84-3211

AN ORDINANCE OF THE CITY COUNCIL OF IOWA CITY AND THE BOARD OF SUPERVISORS OF JOHNSON COUNTY, ADOPTED UNDER THE PROVISIONS OF CHAPTER 329 OF THE IOWA CODE, ADOPTING ZONING REGULATIONS FOR THE PREVENTION OF HAZARDS AND INCOMPATIBLE USES SURROUNDING THE IOWA CITY MUNICIPAL AIRPORT.

BE IT ORDAINED BY THE CITY OF IOWA CITY AND BY JOHNSON COUNTY, IOWA:

SECTION I. PURPOSE. The purpose of this ordinance, to be known as the Johnson County/Iowa City Airport Zoning Ordinance, or the Airport Zoning Ordinance, is to exercise to the fullest extent possible the powers granted to municipalities under Chapter 329 of the Code of Iowa (1983) relating to the restriction of airport hazards in the vicinity of airports by establishing airport overlay zones in which airport hazards and incompatible uses are prohibited.

SECTION II. FINDINGS. The City Council of Iowa City and the Board of Supervisors of Johnson County find that airport haazrds and incompatible uses would endanger the lives and property of users of the Iowa City Municipal Airport, and occupants of land and other persons in its vicinity, and also would tend to destroy or impair the utility of the airport and the public investment therein; accordingly, each municipality does hereby declare that:

(a) The creation or establishment of an airport hazard is a public nuisance causing potential injury to those served by the airport;

(b) It is necessary in the interest of the public health, safety, and general welfare that creation of airport hazards and the establishment of incompatible uses

of land be prevented, and that this be accomplished, by proper exercise of the police power;

(c) The prevention of the creation or establishment of airport hazards and incompatible uses, and the elimination, removal, alteration, mitigation or marking and lighting of existing airport hazards are public purposes for which a municipality may raise and expend public funds, as an incident to the operation of the airport, to acquire land or property interests therein;

(d) Because of the propensity of sanitary landfills for attracting birds, which in turn are hazardous to aircraft in flight, landfills are not considered compatible with airport operations;

(e) It is highly desirable that there be no structures or natural objects or traverseways within the airport clear zones; and

(f) Neither municipality shall become liable for the expenditure of its public funds unless such expenditure shall have been approved in advance by its governing body.

SECTION III. DEFINITIONS. The following definitions only apply in the interpretation and enforcement of the airport overlay zones.

(a) *Airport.* The Iowa City Municipal Airport.

(b) *Airport elevation.* The highest point of the airport's usable landing area measured in feet above mean sea level, which elevation is established to be 661 feet.

(c) *Airoprt hazard.* Any structure, tree or use of land which would exceed the Federal obstruction standards as contained in Part 77 -Subpart C of the Code of Federal Regulations, as revised March 4, 1972 (the "Federal Aviation Regulations" or "FAR"),

and which obstructs the airspace required for the flight of aircraft and landing or takeoff at the airport or is otherwise hazardous to such landing or taking off of aircraft.

(d) *Airport Layout Plan.* A drawing in the Airport Master Plan depicting existing and future property lines and facilities including but not limited to runways, taxiways, aprons, buildings and clear zones. The Airport Layout Plan is a component part of the Master Plan.

(e) *Airport Master Plan.* A comprehensive plan for development of the airport over a 20 year time period. The Master Plan includes among other things, aviation activity forecasts, determinations of needed airport facilities, a financial plan and proposed time schedule for developing facilities included in the Master Plan, and recommendations for use of land on and adjacent to the airport.

(f) *Airport Overlay Zoning Map.* The charts or maps of the Iowa City Municipal Airport upon which the airport overlay zones are depicted. Copies of such map are on file in the office of the City Clerk of Iowa City, and in the office of the Johnson County Auditor.

(g) *Airport primary surface.* A surface longitudinally centered on a runway which extends 200 feet beyond the end of a runway. The width of the primary surface of a runway shall be that width prescribed in Part 77 of the Federal Aviation Regulations for the most precise approach existing or planned for either end of that runway. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.

(h) *Airspace height.* For the purpose of determining the height limits in all zones set forth herein and shown on the Airport Overlay Zoning Map, the datum shall

be mean sea level elevation unless otherwise specified.

(i) *Inner edge.* The inner boundary of an approach or clear zone which is located 200 feet out from the physical end of a paved runway (except as otherwise noted). This inner edge is perpendicular to the runway center line.

(j) *Instrument runway.* A runway with an existing instrument approach procedure or for which an instrument approach procedure has been approved or planned.

(k) *Light lane.* An area on the approach end of a runway reserved for the installation of light bars to reduce landing minimums on instrument approaches. Usually 400 feet by 1600 feet with a slope of 50 to 1.

(l) *Minimum descent altitude.* The lowest altitude, expressed in feet above mean sea level, to which descent is authorized on final approach or during circle-to-land maneuvering in execution of a standard instrument approach procedure and where no electronic glide slope is provided.

(m) *Minimum enroute altitude.* The altitude in effect between radio fixes which assures acceptable navigational signal coverage and meets obstruction clearance requirements between those fixes.

(n) *Minimum obstruction clearance altitude.* The specified altitude in effect between radio fixes on VOR airways, off-airway routes, or route segments which meets obstruction clearance requirements for the entire route segment and which assures acceptable navigational signal coverage within twenty-two (22) miles of a VOR.

(o) *Runway.* A defined area on an airport prepared for landing and takeoff of aircraft along its length.

(p) *Visual runway.* A runway intended solely for the operation of aircraft using visual approach precedures with no straight-in instrument approach procedure and no instrument designation indicated on an FAA approved airport layout plan or on any planning document submitted to the Federal Aviation Administration (FAA) by competent authority.

SECTION IV. AIRPORT ZONES AND AIR-SPACE HEIGHT LIMITATIONS. In order to carry out the provisions of this Section, there are hereby created and established certain zones which are depicted on the Airport Overlay Zoning Map. A structure located in more than one (1) zone of the following zones is considered to be only in the zone with the more restrictive height limitation. The various zones are hereby established and defined as follows:

(a) Horizontal Overlay (OH) Zone.

(1) Defined. The land lying under a horizontal plane 150 feet above the established airport elevation, the perimeter of which is constructed by swinging arcs of 10,000 foot radii from the center of each end of the primary surface of each runway and connecting the adjacent arcs by lines tangent to those arcs.

(NOTE: The radius of the arc specified for each end of a runway will have the same arithmetical value. That value will be the highest determined for either end of the runway. When a 5,000 foot arc is encompassed by tangents connecting two adjacent 10,000 foot arcs, the 5,000 foot arc shall be disregarded on the construction of the perimeter of the horizontal surface.)

(2) Height limitation. No structure shall exceed 150 feet above the established airport elevation in

the OH Zone, as depicted on the Airport Overlay Zoning Map.

(3) Use limitation. Sanitary landfills shall not be permitted in the OH Zone.

(b) Conical Overlay (OC) Zone.

(1) Defined. The land lying under a surface extending outward and upward from the periphery of the horizontal surface of the OH zone at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

(2) Height limitation. No structure shall penetrate the conical surface of the OC Zone, as depicted on the Airport Overlay Zoning Map.

(3) Use limitation. Sanitary landfills shall not be permitted in the OC Zone.

(c) Approach Overlay (OA) Zone.

(1) Defined. The land lying under a surface longitudinally centered on the extended runway centerline and extending outward and upward from each end of the primary surface. (NOTE: An approach surface is applied to each end of each runway based upon the type of approach available or planned for that runway end.)

a. The inner edge of the approach surface is:

1. 500 feet wide for runways 12, 17, 30 and 35.

2. 1000 feet wide for runways 6 and 24 (the inner edge for runway 6 is 1200 feet from the existing pavement.

b. The outer edge of the approach surface is:

1. 1,500 feet wide for runways 12 and 17.

2. 3,500 feet wide for runways 6, 30 and 35.

3. 4,000 feet wide for runway 24.

c. The approach surface zone extends for a horizontal distance of:

1. 5,000 feet at a slope of 20 to 1 for runways 12 and 17.

2. 10,000 feet at a slope of 34 to 1 for runways 6, 24, 30 and 35.

d. The light lane for runway 24 is 400 feet wide beginning at a point 490 feet southwesterly on the runway centerline from the center of the end of the existing runway pavement (including any and all paved safety areas). Extending for a horizontal distance of 1600 feet northeasterly at a slope of 50 to 1.

(2) Height limitation. No structure shall penetrate the approach surface in the OA Zone, as depicted on the Airport Overlay Zoning Map.

(3) Use limitation. Sanitary landfills shall not be permitted in the OA Zone.

(d) Clear Overlay (OCL) Zone.

(1) Defined. The land lying under a surface longitudinally centered on the runway centerline or extension thereof and described as follows:

a. Runway 6—1000 feet wide beginning at a point from the edge of the existing runway on the extended runway centerline for a horizontal distance of 1000 feet; thence widening uniformly to a width of 1425 feet at a distance of 2700 feet from the point of beginning.

b. Runways 12 and 17—500 feet wide at the inner edge of the OA Zone; thence widening uniformly to a width of 700 feet a distance of 1000 feet from the inner edge.

c. Runway 24—1000 feet wide beginning at a point 490 feet southwesterly on the runway centerline from the center of the end of the existing runway pavement (including any and all paved safety areas); thence widening uniformly to a width of 1510 feet at a distance of 1700 feet northeasterly on the extended runway centerline from the point of beginning; thence, at a distance of 1700 feet northeasterly from the point of beginning the width shall be 813 feet wide and widening uniformly to a width of 1010 feet wide at a distance of 2390 feet northeasterly on the extended runway centerline from the point of beginning.

d. Runways 30 and 35—500 feet wide at the inner edge of the OA Zone; thence widening uniformly to a width of 1010 feet at a distance of 1700 feet from the inner edge.

(2) Height limitation. No structure shall penetrate the clear surface of the OCL Zone, as depicted on the Airport Overlay Zoning Map.

(3) Use limitations. No use shall be permitted in the OCL Zone in which there is connected therewith a building which according to the 1982 edition of the Uniform Building Code, has an occupancy rating of 50 square feet of floor area per person or less. In addition, the following uses shall not be permitted:

(a) Campgrounds.

(b) Fairgrounds.

(c) Hospital and institutions.

(a) Motels and hotels.

(e) Nursing and custodial home.

(f) Residential uses.

(g) Restaurants and similar eating and drinking establishments.

(h) Sanitary landfills.

(i) Schools, including nurseries, prekindergartens and kindergartens.

(j) Stadiums.

(k) Storage of fuel or other hazardous materials.

(l) Theaters.

(e) Transitional Overlay (OT) Zone.

(1) Defined. The land lying under those surfaces extending outward and upward at right angles to the runway centerline and the runway centerline extended at a slope of 7 to 1 from the sides of the primary surface and from the sides of the approach surfaces to the intersection with the Horizontal Overlay (OH) Zone.

(2) Height limitation. No structure shall penetrate the transitional surface of the OT Zone, as depicted on the Airport Overlay Zoning Map.

(3) Use limitation. Sanitary landfills shall not be permitted in the OT Zone.

SECTION V. USE RESTRICTIONS. In addition to the above restrictions on land, the following special requirements shall apply.

(a) Any person who proposes any development of a height greater than an imaginary surface extending outward and upward at the slope of 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway shall notify the Federal Aviation Administration (FAA). One executed form set (four copies) of FAA Form 7460-1, Notice of Proposed Construction or Alteration shall be sent to the Chief, Air Traffic Division, of the FAA Regional

Office in Kansas City, Missouri, one copy to the Iowa City Airport Commission, and one copy to the Johnson County/Iowa City Airport Zoning Commission. (Copies of FAA Form 7460-1 may be obtained from the FAA. See Federal Aviation Regulations, Section 77.13.)

EXCEPTION: No person is required to notify the FAA Administrator of the construction or alteration of any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographic features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation. (See Federal Aviation Regulations sec. 77.15.) It shall be the responsibility of the appropriate Building Official, prior to issuance of a building permit for such object, to determine whether or not the shielding satisfies the foregoing requirements.

(b) No structure shall be erected that raises the published minimum descent altitude for an instrument approach to any runway, nor shall any structure be erected that causes the minimum obstruction clearance altitude or minimum enroute altitude to be increased.

(c) *Lighting.*

(1) All lighting or illumination used in conjunction with streets, parking, signs or other use of land and structures shall be arranged and operated in such a manner that it is not misleading or dangerous to aircraft operating from the Airport or in the vicinity thereof.

(2) The owner of any structure over 200 feet above ground level shall install on the structure lighting in accordance with Federal Aviation Admin-

istration Advisory Circular 70-7460 and amendments.

(3) Any permit or variance granted by the Airport Board of Adjustment may be so conditioned as to require the owner of the structure or growth in question to permit the City or the Iowa City Airport Commission to install, operate and maintain thereon such markers or lights as may be necessary to indicate to pilots the presence of an airspace hazard.

(d) No operations from any use shall produce electronic interference with navigation signals or radio communication between the airport and aircraft.

SECTION VI. NON-CONFORMITIES.

A. DEFINED—Any structure or portion thereof which does not conform to the provisions of this Ordinance relative to height, and any use which is not allowed within the Airport Overlay Zone in which it is located by reason of the adoption of Iowa City Ordinance Nos. 83-3133 and 83-3160, or this Ordinance, or subsequent amendments thereto, is non-conforming.

B. REGULATIONS NOT RETROACTIVE—The regulations prescribed herein shall not be construed to require the removal, lowering, or other change to or alteration of any structure or tree not conforming to the regulations as of the effective date of this Ordinance, or to otherwise interfere with the continuance of any non-conforming use. However, no pre-existing non-conforming structure, tree, or use shall be replaced, rebuilt, altered, or allowed to grow higher, or be replanted, so as to constitute a greater airport hazard then it was when these regulations were adopted. Nothing contained herein shall require any change in the construction, alteration, or intended use of any structure, construction or alteration of

which was begun prior to the effective date of this Ordinance and is completed within one (1) year thereafter.

C. MARKING AND LIGHTING—Notwithstanding the preceding provision of this section, the owner of any non-conforming structure or tree is hereby required to permit the installation, operatioon, and maintenance thereof of such margers and lights as shall be necessary to indicate to the operator of aircraft in the vicinity of the Airport, the presence of such airport hazards. Such markers and lights shall be installed, operated, and maintained at the expense of the Iowa City Airport Commission.

SECTION VII. AIRPORT ZONING COMMISSION. A Johnson County/Iowa City Airport Zoning Commission shall be provided as follows:

The Airport Zoning Commission shall consist of five members, two of whom shall be appointed by the Board of Supervisors of Johnson County and two of whom shall be selected by the City Council of the City of Iowa City, Iowa, and one additional member to act as Chairman, who shall be selected by a majority vote of the members selected by the Board of Supervisors and City Council. The terms of such members shall be as provided by Section 329.9 of the Iowa Code. As required by Section 329.9 of the Iowa Code, such Airport Zoning Commission shall follow the procedures provided in Sections 414.4 and 414.6 of the Iowa Code.

SECTION VIII. BOARD OF ADJUSTMENT. An Airport Board of Adjustment ("Board") is hereby established as follows:

The Board shall consist of five members, two of whom shall be appointed by the Board of Supervisors of Johnson County and two of whom shall be appointed by the City Council of Iowa City, and one additional member to

act as Chairman who shall be selected by a majority vote of the members selected by the Board of Supervisors and City Council. The terms of such members shall be as provided in Section 329.12 of the Iowa Code. Such Board shall have the powers and duties and shall follow the procedures, provided by Section 329.11 and 392.12 of the Iowa Code.

SECTION IX. SPECIAL EXCEPTIONS.

(a) The height and use limitations contained in the Airport Overlay Zones may be modified by special exceptions granted by the Airport Board of Adjustment. However, no such special exception shall be granted unless the Board finds, based upon written advice from the Federal Aviation Administration, and the Aeronautics Division of the Iowa Department of Transportation, that—

(1) In an application to permit any structure, tree, or use of land to exceed the height or use limitations of the Airport Overlay Zones, that such structure, tree, or use of land, would not obstruct landing and take-off of aircraft at the Airport.

(2) In an application to permit a use of land otherwise prohibited herein, that such use would not be incompatible with airport operations.

(b) An applicant for a special exception hereunder shall, as part of the application submitted to the Board, file the required written advice of the Federal Aviation Administration, and the Aeronautics Division of the Iowa Department of Transportation. No application for a special exception hereunder shall be set for hearing by the Board until such advice has been filed.

SECTION X. VARIANCES. Any person desiring to erect, or increase the height, of any structure, or to permit the growth of any tree, or otherwise use property in a manner which would constitute a violation of these regulations, may apply to the Board for a variance from

these regulations. Such variances shall be allowed only where a literal application or enforcement of these regulations would result in unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 329 of the Iowa Code; provided however, any such variance may be allowed subject to any reasonable conditions that the Board may deem necessary to effectuate the purposes of Chapter 329 of the Iowa Code, including but not limited to the following: Any such variance shall be subject to a requirement that the person requesting the variance, at such person's own expense, install, operate, and maintain thereon such markers and lights as may be necessary to indicate to operators of aircraft the presence of an airport hazard; and

The reservation of the right of the City of Iowa City and the Iowa City Airport Commission, at their own expense, to go onto the permittee's property to install, operate, and maintain thereon such markers and lights as may be necessary to indicate to operators of aircraft the presence of an airport hazard.

Any appeal from the decision of the Board of Adjustment shall be in accordance with the provisions of Section 414.15 *et seq* of the Iowa Code.

SECTION XI. ADMINISTRATION AND ENFORCEMENT. The administration of these Zoning Regulations shall be performed by the appropriate county or city building official, as the case may be. Enforcement of these Zoning Regulations shall be the responsibility of the Iowa City Airport Commission, or through such persons or representatives as the Iowa City Airport Commission may from time to time direct. However, as provided by Section 329.13 of the Iowa Code, such duties of enforcement and administration shall not include any of the powers herein delegated to the Board of Adjustment.

SECTION XII. EQUITABLE POWERS. The City of Iowa City or the Iowa City Airport Commission may, as authorized by Section 329.5 of the Iowa Code, maintain an action in equity to restrain and abate as a nuisance the creation or establishment of an airport hazard pertaining to the Iowa City Municipal Airport in violation of these regulations for any area, whether within or without the territorial limits of the City of Iowa City.

SECTION XIII. CONFLICTING REGULATIONS. In the event of any conflict between these Airport Zoning Regulations and any other regulations applicable to the same area, whether the conflict be with respect to the height of structures or trees, the use of land, or any other matter, the more stringent limitation or requirements shall govern or prevail.

SECTION XIV. PROHIBITED ACTS. It shall be unlawful for any person to do any of the acts hereinafter stated unless a special exception or variance from the provisions of these regulations shall have been allowed by the Board of Adjustment:

1. No person shall erect or increase the height of any structure, or permit the growth of any tree, to a height in excess of that provided by of these regulations for the zone or area where such act occurs.

2. No person shall hereafter place, or cause to be placed, above ground, transmission or distribution lines or poles or other structures supporting the same within 200 feet of the outer boundary of the airport as said boundary is shown on the Airport Overlay Zoning Map.

3. No person shall otherwise use property within a zone established by these regulations in violation of the use restrictions of these regulations, or in such a manner as to create an airport hazard as defined herein.

SECTION XV. PENALTIES. Each violation of these regulations shall constitute a misdemeanor and the perpetrator thereof, upon conviction, shall be punished by a fine of not more than $100 or by imprisonment for not more than 30 days. Each day a violation occurs or continues to exist shall constitute a separate offense.

SECTION XVI. REPEALER. All ordinances and parts of ordinances in conflict with the provision of this ordinance are hereby repealed. Sections 36-38 through 36-43 of the Iowa Code of Ordinances are also repealed hereby.

SECTION XVII. SEVERABILITY. If any section, provision or part of the Ordinance shall be adjudged to be invalid or unconstitutional, such adjudication shall not affect the validity of the Ordinance as a whole or any section, provision or part thereof not adjudged invalid or unconstitutional.

SECTION XVIII. EFFECTIVE DATE. This Ordinance shall be in effect after its final passage by both the Board of Supervisors of Johnson County and the City Council of Iowa City, approval and publication as required by law.

Passed and approved by the City Council of Iowa City, Iowa, this 6th. day of November, 1984.

/s/ John McDonald
Mayor

Attest: /s/ Marian K. Karr
City Clerk

Passed and approved by the Board of Supervisors of Johnson County, Iowa, this 8th day of November, 1984.

/s/ Howard M. Donnelly
Chairman

Attest: /s/ Tom Shockett
Johnson County Auditor

It was moved by Ambrisco and seconded by Dickson that the Ordinance as read be adopted by the City Council of Iowa City and upon roll call vote there were:

AYES:	NAYS:	ABSENT:
X		Ambrisco
X		Baker
X		Dickson
X		Erdahl
X		McDonald
X		Strait
X		Zuber

First consideration 10/11/84

Vote for passage:
Ayes: Ambrisco, Dickson, McDonald, Strait.
Nays: Zuber. Absent: Baker, Erdahl.

Second consideration: 10/23/84

Vote for passage: Ayes: Zuber, Ambrisco, Baker Dickson, Erdahl, McDonald. Nays: None. Absent: Strait.

Date published 11/14/84

It was moved by Myers and seconded by Ockenfels that the Ordiance as read be adopted by the Johnson County Board of Supervisors, and upon roll call there were:

AYES:	NAYS:	ABSENT:
X		Donnelly
X		Langenberg
X		Myers
X		Ockenfels
	X	Sehr

First consideration 10/11/84

Vote for passage:
Ayes: Donnelly, Langenberg, Myers, Ockenfels.
Nays: Sehr.

Second consideration: 10/25/84

Vote for passage:
Ayes: Donnelly, Langenberg, Myers, Ockenfels.
Nays: Sehr.

Dated published _____

CITY OF IOWA CITY
Civic Center 410 E. Washington St.
Iowa City, Iowa 52240
(319) 356-5000

STATE OF IOWA)
) ss
JOHNSON COUNTY)

I, Ramona Parott, Deputy City Clerk of the City of Iowa City, Iowa, do hereby certify that the Ordinance attached hereto is a true and correct copy of the Ordinance No. 90-3446 which was passed by the City Council of Iowa City, Iowa, at a regular meeting held on the 9th day of January, 1990, all as the same appears of record in my office.

Dated at Iowa City, Iowa, this 5th day of July 1990.

/s/ Ramona Parrott
RAMONA PARROTT
Deputy City Clerk

ORDINANCE NO. 90-3446

AN ORDINANCE AMENDING CHAPTER 4 OF THE CODE OF ORDINANCES OF THE CITY OF IOWA CITY, IOWA, ENTITLED "AIRPORTS AND AVIATION," BY REPEALING ARTICLE V THEREOF, ENTITLED "AIRPORT ZONING," AND BY ENACTING IN LIEU THEREOF ARTICLE V, "AIRPORT ZONING," AS AMENDED, WHICH AMENDMENTS PROVIDE FOR THE REARRANGEMENT AND RENUMBERING OF SECTIONS, PROVIDE FOR A REVISED AIRPORT ZONING MAP, PROVIDE FOR PROVISIONAL MODIFICATION OF HEIGHT AND USE LIMITATIONS, AND CLARIFIES THE PROVISION REQUIRING NOTIFICATION TO THE FEDERAL AVIATION ADMINISTRATION OF PROPOSED DEVELOPMENT.

PREAMBLE:

WHEREAS, the Federal Aviation Administration (FAA) has, pursuant to Federal Law, adopted a comprehensive set of regulations governing airports, which regulations pre-date Iowa City's Airport Zoning Ordinance and are designed to prevent uses incompatible with or constituting a hazard to aviation; and

WHEREAS, the purpose of this ordinance is to codify and to provide for local enforcement of the said FAA regulations; and

WHEREAS, the FAA has approved a revised Airport Layout Plan (ALP), which ALP is incorporated into the revised Airport Zoning Map and airport overlay zone descriptions contained herein.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF IOWA CITY, IOWA:

SECTION 1. That Chapter 4 of the Code of Ordinances of the City of Iowa City, Iowa, entitled "Airports and

Aviation," is hereby amended by repealing Article V thereof, entitled "Airport Zoning," and by enacting in lieu thereof an amended Article V to read as follows:

ARTICLE V. AIRPORT ZONING

Sec. 4-71. Purpose.

The purpose of this article, to be known as the "Johnson County/Iowa City Airport Zoning Ordinance," or the "Airport Zoning Ordinance," is to exercise to the fullest extent possible the powers granted to municipalities under Chapter 329 of the Code of Iowa (1989), and to codify existing regulations of the Federal Aviation Administration relating to land uses incompatible with or constituting a hazard to aviation at the Iowa City Municipal Airport.

The city council of Iowa City and the board of supervisors of Johnson County find that airport hazards and incompatible uses would endanger the lives and property of users of the Iowa City Municipal Airport, as well as occupants of land and other persons in its vicinty, and would also tend to impair the operation of the airport and the public investment therein; accordingly, each municipality does hereby declare that:

(a) The creation or establishment of an airport hazard is a public nuisance causing potential injury to those living in the community and to those served by the airport;

(b) It is necessary in the interest of the public health, safety, and general welfare that creation of airport hazardos and the establishment of incompatible uses of land be prevented, and that this be accomplished, to the extent legally possible, by proper exercise of the police power;

(c) The protection of lives and property, the prevention of the creation or establishment of airport hazards and incompatible uses, and the elimination, removal,

alteration, mitigation or making and lighting of existing airport hazards are public purposes for which a municipalty may raise and expend public funds, as an incident to the operation of the airport, to acquire land or property interests herein.

(d) Because of the propensity of sanitary landfills for attracting birds, which in turn are hazardous to aircraft in flight, landfills are considered incompatible with airport operations;

(e) It is highly desirable that there be no structures, natural objects, or traverseways which constitute or create a hazard within the airport clear zones; and

(f) Neither municipality shall become liable for the expenditure of its public funds unless such expenditure shall have been approved in advance by its governing body.

Sec. 4-73. Definitions.

The following definitions only apply in the interpretation and enforcement of the airport overlay zones:

Airport: The Iowa City Municipal Airport.

Airport elevation: The highest point of the airport's useable landing area measured in feet above mean sea level, which elevation is established to be six hundred sixty-eight (668) feet.

Airport hazard: Any structure, tree or use of land which would exceed the Federal obstruction standards as contained in Part 77, Subpart C of the Code of Federal Regulations, as revised in January 1989 (the "Federal Aviation Regulations" or "FAR"), and which obstructs the airspace required for the flight of aircraft and landing or takeoff at the airport or is otherwise hazardous to such landing or taking off of aircraft.

Airport layout plan: A drawing in the airport master plan depicting existing and future property lines and

facilities including but not limited to runways, taxiways, aprons, buildings and clear zones. The airport layout plan is a component part of the master plan.

Airport master plan: A comprehensive plan for development of the airport over a twenty-year time period. The master plan includes, among other things, aviation activity forecasts, determinations of needed airport facilities, a financial plan and proposed time schedule for developing facilities included in the master plan, and recommendations for use of land on and adjacent to the airport.

Airport overlay zoning map: The charts or maps of the Iowa City Municipal Airport upon which the airport overlay zones are depicted. Copies of such map are on file in the office of the city clerk of Iowa City, and in the office of the Johnson County auditor.

Airport primary surface: A surface longitudinally centered on a runway which extends two hundred (200) feet beyond the end of a runway. The width of the primary surface of a runway shall be that width prescribed in Part 77 of the Federal Aviation Regulations for the most precise approach existing or planned for either end of that runway. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway center line.

Airport height: For the purpose of determining the height limits in all zones set forth herein and shown on the airport overlay zoning map, the datum shall be mean sea level elevation unless otherwise specified.

Inner edge: The inner boundary of an approach or clear zone which is located two hundred (200) feet out from the physical end of a paved runway (except as otherwise noted). This inner edge is perpendicular to the runway center line.

Instrument runway: A runway with an existing instrument approach procedure or for which an instrument approach procedure has been approved or planned.

Light lane: An area on the approach end of a runway reserved for the installation of light bars to reduce landing minimums on instrument approaches, usually four hundred (400) feet by one thousand six hundred (1,600) feet, with a slope of fifty (50) to one (1).

Minimum descent altitude: The lowest altitude, expressed in feet above mean sea level, to which descent is authorized on final approach or during cycle-to-land maneuvering in execution of a standard instrument approach procedure and where no electronic guide slope is provided, as most recently established by publication by the FAA.

Minimum enroute altitude: The altitude in effect between radio fixes which assures acceptable navigational signal coverage and meets obstruction clearance requirements between those fixes, as most recently established by publication by the FAA.

Minimum obstruction clearance altitude: The specified altitude in effect between radio fixes on VOR airways, off-airway routes, or route segments which meets obstruction clearance requirements for the entire route segment and which assures acceptable navigational signal coverage within twenty-two (22) nautical miles of a VOR, as most recently established by publication by the FAA.

Runway: A defined area on an airport prepared for landing and takeoff of aircraft along its length.

Visual runway: A runway intended solely for the operation of aircraft using visual approach procedures with no straight-in instrument approach procedure and no instrument designation indicated on an FAA approved airport layout plan or on any planning document submitted to the Federal Aviation Administration (FAA) by competent authority.

Sec. 4-74. Notification of proposed development.

(a) Any person who proposes any development of a height greater than an imaginary surface extending outward and upward at a slope of one hundred (100) to one for a horizontal distance of twenty thousand (20,000) feet from the nearest point of the nearest runway shall notify the Federal Aviation Administration (FAA). One executed form set (four (4) copies) of FAA Form 7460-1, "Notice of Proposed Construction or Alteration" shall be sent to the chief, air traffic division, of the FAA Regional Office in Kansas City, Missouri, one copy to the Iowa City Airport Commission, and one copy to the Johnson County/Iowa City Airport Zoning Commission. (Copies of FAA Form 7460-1 may be obtained from the FAA. See Federal Aviation Regulations, Section 77.13.)

(b) EXCEPTION: No person is required to notify the FAA Administrator of the construction or alteration of any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographic features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation. (See Federal Aviation Regulations, Section 77.15.) It shall be the responsibility of the appropriate building official, prior to issuance of a building permit for such object, to determine whether or not the shielding satisfies the foregoing requirements.

Sec. 4-75. Airport zones and air space height limitations.

In order to carry out the provisions of this section, there are hereby created and established certain zones which are depicted on the airport overlay zoning map. The

maps prepared by Howard R. Green Company, dated June 1988, and filed in the offices of the city clerk of Iowa City and the Johnson County auditor are hereby adopted, designated and declared to be the airport overlay zoning map for the Iowa City Municipal Airport. A structure located in more than one zone of the following zones is considered to be only in the zone with the more restrictive height limitation. The various zones are hereby established and defined as follows:

(a) *Horizontal overlay (OH) zone.*

(1) *Defined.* The land lying under a horizontal plane one hundred fifty (150) feet above the established airport elevation, the perimeter of which is constructed by swinging arcs of ten thousand-foot radii from the center of each end of the primary surface of each runway and connecting the adjacent arcs by lines tangent to those arcs.

(NOTE: The radius of the arc specified for each end of a runway will have the same arithmetical value. The value will be the highest determined for either end of the runway. When a five thousand-foot arc is encompassed by tangents connecting two (2) adjacent ten thousand-foot arcs, the five thousand-foot arc shall be disregarded on the construction of the perimeter of the horizontal surface.)

(2) *Height limitation.* No structure, except as herein provided, shall extend one hundred fifty (150) feet above the established airport elevation in the OH zone as depicted on the airport overlay zoning map.

(3) *Use limitation.* Sanitary landfills shall not be permitted in the OH zone.

(b) *Conical overlay (OC) zone.*

(1) *Defined.* The land lying under a surface extending outward and upward from the periphery of the horizontal surface of the OH zone at a slope of twenty (20) to one for a horizontal distance of four thousand (4,000) feet.

(2) *Height limitation.* No structure, except as herein provided, shall penetrate the conical surface in the OC zone as depicted on the airport overlay zoning map.

(3) *Use limitation.* Sanitary landfills shall not be permitted in the OC zone.

(c) *Approach overlay (OA) zone.*

(1) *Defined.* The land lying under a surface longitudinally centered on the extended runway center line and extending outward and upward from each end of the primary surface. (Note: An approach surface is applied to each end of each runway based upon the type of approach available or planned for that runway end.)

a. The inner edge of the approach surface is:

1. Five hundred (500) feet wide for runways 12, 17, 30 and 35.

2. One thousand (1,000 feet wide for runways 6 and 24.

b. The outer edge of the approach surface is:

1. One thousand five hundred (1,500) feet wide for runways 12, 17, and 30.

2. Three thousand five hundred (3,500) feet wide for runways 6 and 35.

3. Four thousand (4,000) feet wide for runway 24.

c. The approach surface zone extends for a horizontal distance of:

1. Five thousand (5,000) feet at a slope of twenty (20) to one for runways 12, 17, and 35.

2. Ten thousand (10,000) feet at a slope of thirty-four (34) to one for runways 6, 24, and 35.

d. The light lane for runway 24 is four hundred (400) feet wide beginning at a point four hundred ninety (490) feet southwesterly on the runway center line from the center of the end of the runway pavement (including any and all paved safety areas), extending for a horizontal distance of one thousand six hundred (1,600) feet northeasterly at a slope of fifty (50) to one.

(2) *Height limitation.* No structure except as herein provided, shall penetrate the approach surface in the OA zone as depicted on the airport overlay zoning map.

(3) *Use limitation.* Sanitary landfills shall not be permitted in the OA zone.

(d) *Clear overlay (OCL) zone.*

(1) *Defined.* The land lying under a surface longitudinally centered on the runway center line or extension thereof and described as follows:

a. Runway 6—1,000 feet wide beginning at a point on the runway center line extended 200 feet out from the end of the pavement, and extending to the southwest on the extended center line for a distance of 1,700 feet and widening uniformly to a width of 1,510 feet.

b. Runway 12—500 feet wide beginning at a point on the runway center line extended 200 feet out from the end of the pavement, and extending to the northwest on the extended center line for a distance of 1,000 feet and widening uniformly to a width of 700 feet.

c. Runway 17—500 feet wide beginning at a point 225 feet in (south) from the end of the pavement, and extending to the north on the extended center line for a distance of 1,000 feet and widening uniformly to a width of 700 feet.

d. Runway 24—1,000 feet wide beginning at a point on the runway center line extended 200 feet out from the end of the pavement, and extending to the northeast on the extended center line for a distance of 1,700 feet and widening uniformly to a width of 1,425 feet.

e. Runway 30—500 feet wide beginning at a point 275 feet in (northwest) from the edge of the pavement, and extending to the southeast on the extended center line for a distance of 1,000 feet and widening uniformly to a width of 700 feet.

f. Runway 35—500 feet wide beginning at a point on the runway center line extended 200 feet out from the end of the pavement, and extending to the south on the extended center line for a distance of 1,700 feet and widening uniformly to a width of 1,010 feet.

(2) *Height limitation.* No structure, except as herein provided, shall penetrate the clear surface of the OCL zone, as depicted on the airport overlay zoning map.

(3) *Use limitations.* No use, except as herein provided, shall be permitted in the OCL zone in which there is connected therewith a building which according to the 1988 Edition of the Uniform Building Code, has an occupancy rating of fifty (50) square feet of floor area per person or less. In addition, the following uses shall not be permitted, except as herein provided:

a. Campgrounds.

b. Fairgrounds.

c. Hospitals and institutions.

d. Motels and hotels.

e. Nursing and custodial home.

f. Residential uses.

g. Restaurants and similar eating and drinking establishments.

h. Schools, including nurseries, prekindergartens and kindergartens.

i Stadiums.

j. Storage of fuel or other hazardous materials.

k. Theaters.

l. Sanitary landfills.

(e) *Transistional overlay (OT) zone.*

(1) *Defined.* The land lying under those surfaces extending outward and upward at right angles to the runway center line and the runway center line extended at a slope of seven (7) to one from the sides of the primary surface and from the sides of the approach surfaces to the intersection with the horizontal overlay (OH) zone.

(2) *Height limitation.* No structure, except as herein provided, shall penetrate the transitional

surface of the OT zone, as depicted on the airport overlay zoning map.

(3) *Use limitation.* Sanitary landfills shall not be permitted on the OT zone.

Sec. 4-76. Use restrictions.

In addition to the above restrictions on land, the following special requirements shall apply to properties within the airport zones described in Section 4-75 and shown on the Airport Zoning Map.

(a) No structure shall be erected that raises the published minimum descent altitude for an instrument approach to any runway, nor shall any structure be erected that causes the minimum obstruction clearance altitude or minimum enroute altitude to be increased.

(b) Lighting.

(1) All lighting or illumination used in conjunction with streets, parking, signs or other uses of land and structures shall be arranged and operated in such a manner that it is not misleading or dangerous to aircraft operating from the airport or in the vicinity thereof.

(2) The owner of any structure over two hundred (200) feet above ground level shall install on the structure lighting in accordance with Federal Aviation Administration Advisory Circular 70-7460 and amendments.

(3) Any permit or variance granted by the airport board of adjustment may be so conditioned as to require the owner of the structure or growth in question to permit the city or the Iowa City airport commission to install, operate and maintain thereon such markers or lights as may be neces-

sary to indicate to pilots the presence of an airspace hazard.

(c) No operations from any use shall produce electronic interference with navigation signals or radio communication between the airport and aircraft.

Sec. 4-77. Nonconformities.

(a) *Defined.* Any structure or portion thereof which does not conform to the provisions of this article relative to height, and any use which is not allowed within the airport overlay zone in which it is located by reason of the adoption of Iowa City Ordinance Nos. 83-3133 and 83-3160, or this article or subsequent amendments thereto, is nonconforming.

(b) *Regulations not retroactive.* The regulations prescribed herein shall not be construed to require the removal, lowering, or other change to or alteration of any structure or tree not conforming to the regulations as of the effective date of this article, or to otherwise interfere with the continuance of any nonconforming use. However, no pre-existing nonconforming structure, tree, or use shall be replaced, rebuilt, altered, or allowed to grow higher, or to be replanted, so as to constitute a greater airport hazard than it was when these regulations were originally adopted. Nothing continued herein shall require any change in the construction, alteration, or intended use of any structure, construction or alteration of which was begun prior to the effective date of this article and is completed within one year thereafter.

(c) *Marking and lighting.* Notwithstanding the preceding provision of this section, the owner of any nonconforming structure or tree is hereby required to permit the installation, operation, and maintenance thereon of such markers and lights as shall be necessary to indicate to the operator of aircraft in the vicinity of the airport, the presence of such airport

hazards. Such markers and lights shall be installed, operated, and maintained at the expense of the Iowa City Airport Commission.

Sec. 4-78. Airport zoning commission.

A Johnson County/Iowa City Airport Zoning Commission shall be provided as follows: The airport zoning commission shall consist of five (5) members, two (2) of whom shall be appointed by the board of supervisors of Johnson County and two (2) of whom shall be selected by the city council of the City of Iowa City, Iowa, and one additional member to act as chairman, who shall be selected by a majority vote of the members selected by the board of supervisors and city council. The terms of such members shall be as provided by Section 329.9 of the Iowa Code. As required by Section 329.9 of the Iowa Code, such airport zoning commission shall follow the procedures provided in Section 414.4 and 414.6 of the Iowa Code.

Sec. 4-79. Board of adjustment.

An airport board of adjustment ("board") is hereby established as follows: The board shall consist of five (5) members, two (2) of whom shall be appointed by the board of supervisors of Johnson County and two (2) of whom shall be appointed by the city council of Iowa City, and one additional member to act as chairman who shall be selected by a majority vote of the members selected by the board of supervisors and city council. The terms of such members shall be provided in Section 329.12 of the Iowa Code. Such board shall have the powers and duties, and shall follow the procedures, provided by Sections 329.11 and 329.12 of the Iowa Code.

Sec. 4-80. Provisional modification.

(a) Any person desiring to construct a structure or establish a use which exceeds or violates the height and/or use limitations for the airport overlay zones

as provided in Section 4-75 may request a provisional modification of those regulations as herein provided. The appropriate building official may grant a request for provisional modification if the proposed structure or use:

(1) Is not considered an airport hazard or an incompatible use by the Federal Aviation Administration; and

(2) Will not result in the construction or establishment of a structure or use that raises the published minimum descent altitude for an instrument approach to any runway, or that causes any minimum obstruction clearance altitude or minimum enroute altitude to be increased, as determined by the FAA.

(b) Persons requesting such a provisional modification shall file FAA Form 7460-1 "Notice of Proposed Construction or Alteration" in accordance with the notice provisions of Section 4-74, and the notice provisions of FAR Part 77.13. If the Federal Aviation Administration issues a determination that the proposed structure or use is not consistent with the provisions of (a)(1) and (2) above, the building official shall deny such proposed modification to the height and/or use provisions contained in the airport overlay zones. Such denial shall not preclude an application for a special exception or variance to the airport board of adjustment, as provided in Section 4-81 and 4-82.

Sec. 4-81.

Any structure which is deemed by the appropriate building official to be shielded, in accordance with the provisions of FAR Part 77.13 and Section 4-74(b) above, shall not be subject to the height restrictions contained herein, so long as the structure height does not exceed the height of the shielding structure.

Sec. 4-82. Special exceptions.

(a) The height and use limitations contained in the airport overlay zones may be modified by special exception granted by the airport board of adjustment. However, no such special exception shall be granted unless the board finds, based upon written determination from the Federal Aviation Administration and the aeronautics division of the Iowa Department of Transportation, that:

(1) In an application to permit any structure, tree, or use of land to exceed the height or use limitations of the airport overlay zones, that such structure, tree, or use of land, as proposed, will not obstruct landing and take-off of aircraft at the airport and will not constitute a hazard to aviation.

(2) In the application to permit a use of land otherwise prohibited herein, that such use, as proposed wil not be incompatible with airport operations and does not create/constitute a hazard.

(b) An applicant for a special exception hereunder shall, as part of the application submitted to the board, file the required written advice of the Federal Aviation Administration, and the aeronautics division of the Iowa Department of Transportation. No application for a special exception hereunder shall be set for hearing by the board until such determination has been issued.

(c) In making it determination on an application for a special exception, the board shall apply and be bound by State and Federal regulations applicable to the Iowa City Municipal Airport.

(d) In making a determination on an application for a special exception as to use, where the structure has been determined to be shielded in accordance

with Section 4-81 of this Ordinance, written advice of the FAA and IDOT in regard to the proposed use shall not be required.

Sec. 4-83. Variances.

(a) Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or otherwise use property in a manner which would constitute violation of these regulations, may apply to the board for a variance from these regulations. Such variances shall be allowed only where a literal application or enforcement of these regulations would result in unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 329 of the Iowa Code; provided, however, any such variance may be allowed subject to any reasonable conditions that the board may deem necessary to effectuate the purposes of Chapter 329 of the Iowa Code, including but not limited to the following: Any such variance shall be subject to a requirement that the person requesting the variance, at such person's own expenses, install, operate, and maintain thereon such markers and lights as may be necessary to indicate to operators of aircraft the presence of an airport obstruction; and the reservation of the right of the City of Iowa City and the Iowa City Airport Commission, at their own expenses, to go onto the permittee's property to install, operate, and maintain thereon such markers and lights as may be necessary to indicate to operators of aircraft the presences of an airport obstruction.

(b) In making its determination on an application for a variance, the board shall apply and be bound by State and Federal regulations applicable to the Iowa City Municipal Airport.

(c) Any appeal from the decision of the board of adjustment shall be in accordance with the provisions of Section 414.15 et seq. of the Iowa Code.

Sec. 4-84. Administration and enforcement.

The administration of these zoning regulations shall be performed by the appropriate county or city building official, as the case may be. Enforcement of these zoning regulations shall be the responsibility of the Iowa City Airport Commission, or through such persons or representatives as the Iowa City Airport Commission may from time to time direct. However, as provided by Section 329.13 of the Iowa Code, such duties of enforcement and administration shall not include any of the powers herein delegated to the board of adjustment.

Sec. 4-85. Equitable remedies.

The City of Iowa or the Iowa City Airport Commission may, as authorized by Section 329.5 of the Iowa Code, maintain an action in equity to restrain and abate as a nuisance the creation or establishment of an airport hazard pertaining to the Iowa City Municipal Airport in violation of these regulations for any area, whether within or without the territorial limits of the City of Iowa City.

Sec. 4-86. Conflicting regulations.

In the event of any conflict between these airport zoning regulations and any other regulations applicable to the same area, whether the conflict be with respect to the height of structures or trees, the use of land, or any other matter, the more stringent limitation or requirements shall control.

Sec. 4-87. Prohibited acts.

It shall be unlawful for any person to do any of the acts hereinafter stated unless a provisional modification, spe-

cial exception, or variance from the provisions of these regulations shall have been granted.

(1) No person shall erect or increase the height of any structure, or permit the growth of any tree, to a height in excess of that provided by [any] of these regulations for the zone or area where such act occurs, except as provided in this Article.

(2) No person shall hereafter place, or cause to be placed, above ground, transmission or distribution lines or poles or other structures supporting the same within two hundred (200) feet of the outer boundary of the airport as said boundary is shown on the airport overlay zoning map.

(3) No person shall otherwise use property within a zone established by these regulations in violation of the restrictions of these regulations, or in such a manner as to create an airport hazard as defined herein, except as provided in this Article.

Sec. 4-88. Penalties.

Each violation of these regulations shall constitute a misdemeanor or a municipal infraction, and shall be punishable as provided in Chapter 1 of this Code. Each day a violation occurs or continues to exist shall constitute a separate offense.

Secs. 4-89 and 4-90. Reserved.

SECTION 2. SEVERABILITY: If any section, provision or part of the Ordinance shall be adjudged to be invalid or unconstitutional, such adjudication shall not affect the validity of the Ordinance as a whole or any section, provision or part thereof not adjudged invalid or unconstitutional.

SECTION 3. REPEALER: All ordinances and parts of ordinances in conflict with the provisions of this Ordinance are hereby repealed.

SECTION 4. EFFECTIVE DATE: This Ordinance shall be in effect after its final passage, approval and publication as required by law.

Passed and approved this 9th day of January, 1990.

/s/ John McDonald
Mayor

ATTEST: /s/ Marian K. Karr
City Clerk

Approved as to Form

/s/ G.L. Simmins 11/20/89
Legal Department

It was moved by Ambrisco and seconded by Larson that the Ordiance as read be adopted, and upon roll call there were:

AYES:	NAYS:	ABSENT:	
X			
X			Ambrisco
X			Balmer
X			Courtney
X			Horowitz
X			Kubby
X			Larson
X			McDonald

First Consideration 12/12/89

Vote for passage: Ayes: Ambrisco, Balmer, Courtney, Horowitz, Kubby, Larson, McDonald. Nays: None. Absent: None.

Second Consideration 12/19/89

Vote for passage: Ayes: Larson, McDonald, Balmer, Horowitz, Kubby. Nays: None. Absent: Ambrisco, Courntney.

Date published 1/17/90

PART 75—[RESERVED]

PART 77—OBJECTS AFFECTING NAVIGABLE AIRSPACE

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Subpart A—General

§ 77.1 Scope.

This part:

(a) Establishes standards for determining obstructions in navigable airspace;

(b) Sets forth the requirements for notice to the Administrator of certain proposed construction or alteration;

(c) Provides for aeronautical studies of obstructions to air navigation, to determine their effect on the safe and efficient use of airspace;

(d) Provides for public hearings on the hazardous effect of proposed construction or alteration on air navigation; and

(e) Provides for establishing antenna farm areas.

§ 77.2 Definition of terms.

For the purpose of this part:

Airport available for public use means an airport that is open to the general public with or without a prior request to use the airport.

A seaplane base is considered to be an airport only if its sea lanes are outlined by visual markers.

Nonprecision instrument runway means a runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved, or planned, and for which no precision approach facilities are planned, or indicated on an FAA planning document or military service military airport planning document.

Precision instrument runway means a runway having an existing instrument approach procedure utilizing an Instrument Landing System (ILS), or a Precision Approach Radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated by an FAA approved airport layout plan; a military service approved military airport layout plan; any other FAA planning document, or military service military airport planning document.

Utility runway means a runway that is constructed for and intended to be used by propeller driven aircraft of 12,500 pounds maximum gross weight and less.

Visual runway means a runway intended solely for the operation of aircraft using visual approach procedures, with no straight-in instrument approach procedure and no instrument designation indicated on an FAA approved airport layout plan, a military service approved military airport layout plan, or by any planning document submitted to the FAA by competent authority.

[Amdt. 77-5, 33 FR 5256, Apr. 2, 1968, as amended by Amdt. 77-9, 36 FR 5969, Apr. 1, 1971]

§ 77.3 Standards.

(a) The standards established in this part for determining obstructions to air navigation are used by the Administrator in:

(1) Administering the Federal-aid Airport Program and the Surplus Airport Program;

(2) Transferring property of the United States under section 16 of the Federal Airport Act;

(3) Developing technical standards and guidance in the design and construction of airports; and

(4) Imposing requirements for public notice of the construction or alteration of any structure where notice will promote air safety.

(b) The standards used by the Administrator in the establishment of flight procedures and aircraft operational limitations are not set forth in this part but are contained in other publications of the Administrator.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-9, 36 FR 5970, Apr. 1, 1971]

§ 77.5 Kinds of objects affected.

This part applies to:

(a) Any object of natural growth, terrain, or permanent or temporary construction or alteration, including equipment or materials used therein, and apparatus of a permanent or temporary character; and

(b) Alteration of any permanent or temporary existing structure by a change in its height (including appurtenances), or lateral dimensions, including equipment or materials used therein.

Subpart B—Notice of Construction or Alteration

§ 77.11 Scope

(a) This subpart requires each person proposing any kind of construction or alteration described in § 77.13(a) to give adequate notice to the Administrator. It specifies the locations and dimensions of the construction or alteration for which notice is required and prescribes the form and manner of the notice. It also requires supplemental notices 48 hours before the start and upon the completion of certain construction or alteration that was the subject of a notice under § 77.13(a).

(b) Notices received under this subpart provide a basis for:

(1) Evaluating the effect of the construction or alteration on operational procedures and proposed operational procedures;

(2) Determinations of the possible hazardous effect of the proposed construction or alteration on air navigation;

(3) Recommendations for identifying the construction or alteration in accordance with the current Federal Aviation Administration Advisory Circular AC 70/7460-1 entitled "Obstruction Marking and Lighting," which is available with charge from the Department of Transportation, Distribution Unit, TAD 484.3, Washington, DC 20590.

(4) Determining other appropriate measures to be applied for continued safety of air navigation; and

(5) Charting and other notification to airman of the construction or alteration.

(Sec. 6, 80 Stat. 937, 49 U.S.C. 1655)

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-8, 33 FR 18614, Dec. 17, 1968; Amdt. 77-10, 37 FR 4705, Mar. 4, 1972]

§ 77.13 Construction or alteration requiring notice.

(a) Except as provided in § 77.15, each sponsor who proposes any of the following construction or alteration shall notify the Administrator in the form and manner prescribed in § 77.17:

(1) Any construction or alteration of more than 200 feet in height above the ground level at its site.

(2) Any construction or alteration of greater height than an imaginary surface extending outward and upward at one of the following slopes:

(i) 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of each airport specified in paragraph (a)(5) of this section with at least one runway more than 3,200 feet in actual length, excluding heliports.

(ii) 50 to 1 for a horizontal distance of 10,000 feet from the nearest point of the nearest runway of each airport specified in paragraph (a)(5) of this section with its longest runway no more than 3,200 feet in actual length, excluding heliports.

(iii) 25 to 1 for a horizontal distance of 5,000 feet from the nearest point of the nearest landing and takeoff area of each heliport specified in paragraph (a)(5) of this section.

(3) Any highway, railroad, or other traverse way for mobile objects, of a height which, if adjusted upward 17 feet for an Interstate Highway that is part of the National System of Military and Interstate Highways where overcrossings are designed for a minimum of 17 feet vertical distance, 15 feet for any other public roadway, 10 feet or the height of the highest mobile object that would normally traverse the road, whichever is greater, for a private road, 23 feet for a railroad, and for a waterway or any other traverse way not previously mentioned, an amount equal to the height of the highest mobile object

that would normally traverse it, would exceed a standard of paragraph (a)(1) or (2) of this section.

(4) When requested by the FAA, any construction or alteration that would be in an instrument approach area (defined in the FAA standards governing instrument approach procedures) and available information indicates it might exceed a standard of subpart C of this part.

(5) Any construction or alteration on any of the following airports (including heliports);

(i) An airport that is available for public use and is listed in the Airport Directory of the current Airman's Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement.

(ii) An airport under construction, that is the subject of a notice on proposal on file with the Federal Aviation Administration, and, except for military airports, it is clearly indicated that that airport will be available for public use.

(iii) An airport that is operated by an armed force of the United States.

(b) Each sponsor who proposes construction or alteration that is the subject of a notice under paragraph (a) of this section and is advised by an FAA regional office that a supplemental notice is required shall submit that notice on a prescribed form to be received by the FAA regional office at least 48 hours before the start of the construction or alteration.

(c) Each sponsor who undertakes construction or alteration that is the subject of a notice under paragraph (a) of this section shall, within 5 days after that construction or alteration reaches its greatest height, submit a supplemental notice on a prescribed form to the FAA regional office having jurisdiction over the region involved, if—

(1) The construction or alteration is more than 200 feet above the surface level of its site; or

(2) An FAA regional office advises him that submission of the form is required.

[Amdt. 77-5, 33 FR 5256, Apr. 2, 1968, as amended by Amdt. 77-9, 36 FR 5970, Apr. 1, 1971; Amdt. 77-10, 37 FR 4705, Mar. 4, 1972]

§ 77.15 Construction or alteration not requiring notice.

No person is required to notify the Administrator for any of the following construction or alteration:

(a) Any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographic features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation.

(b) Any antenna structure of 20 feet or less in height except one that would increase the height of another antenna structure.

(c) Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device, of a type approved by the Administrator, or an appropriate military service on military airports, the location and height of which is fixed by its functional purpose.

(d) Any construction or alteration for which notice is required by any other FAA regulation.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-5, 33 FR 5257, Apr. 2, 1968; Amdt. 77-9, 36 FR 5970, Apr. 1, 1971]

§ 77.17 Form and time of notice.

(a) Each person who is required to notify the Administrator under § 77.13(a) shall send one executed form set (four copies) of FAA Form 7460-1, Notice of Proposed Construction or Alteration, to the Manager, Air Traffic Division, FAA Regional Office having jurisdiction over the area within which the construction or alteration will be located. Copies of FAA Form 7460-1 may be obtained from the headquarters of the Federal Aviation Administration and the regional offices.

(b) The notice required under § 77-13(a)(1) through (4) must be submitted at least 30 days before the earlier of the following dates:

(1) The date the proposed construction or alteration is to begin.

(2) The date an application for a construction permit is to be filed.

However, a notice relating to proposed construction or alteration that is subject to the licensing requirements of the Federal Communications Act may be sent to FAA at the same time the application for construction is filed with the Federal Communications Commission, or at any time before that filing.

(c) A proposed structure or an alteration to an existing structure that exceeds 2,000 feet in height above the ground will be presumed to be a hazard to air navigation and to result in an inefficient utilization of airspace and the applicant has the burden of overcoming that presumption. Each notice submitted under the pertinent provisions of this part 77 proposing a structure in excess of 2,000 feet above ground, or an alteration that will make an existing structure exceed that height, must contain a detailed showing, directed to meeting this burden. Only in exceptional cases, where the FAA concludes that a

clear and compelling showing has been made that it would not result in an inefficient utilization of the airspace and would not result in a hazard to air navigation, will a determination of no hazard be issued.

(d) In the case of an emergency involving essential public services, public health, or public safety that requires immediate construction or alteration, the 30-day requirement in paragraph (b) of this section does not apply and the notice may be sent by telephone, telegraph, or other expeditious means, with an executed FAA Form 7460-1 submitted within 5 days thereafter. Outside normal business hours, emergency notices by telephone or telegraph may be submitted to the nearest FAA Flight Service Station.

(e) Each person who is required to notify the Administrator by paragraph (b) or (c) of § 77.13, or both, shall send an executed copy of FAA Form 117-1, Notice of Progress of Construction or Alteration, to the Manager, Air Traffic Division, FAA Regional Office having jurisdiction over the area involved.

(Sec. 6, 80 Stat. 937, 49 U.S.C. 1655)

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-2, 31 FR 9449, July 12, 1966; Amdt. 77-8, 33 FR 18614, Dec. 17, 1968; Amdt. 77-10, 37 FR 4705, Mar. 4, 1972; Amdt. 77-11, 54 FR 39292, Sept. 25, 1989]

§ 77.19. Acknowledgment of notice.

(a) The FAA acknowledges in writing the receipt of each notice submitted under § 77.13(a).

(b) If the construction or alteration proposed in a notice is one for which lighting or marking standards are prescribed in the FAA Advisory Circular AC 70/7460-1, entitled "Obstruction Marking and Lighting," the acknowledgment contains a statement to that effect and information on how the structure should be marked and lighted in accordance with the manual.

(c) The acknowledgment states that an aeronautical study of the proposed construction or alteration has resulted in a determination that the construction or alteration:

(1) Would not exceed any standard of subpart C and would not be a hazard to air navigation;

(2) Would exceed a standard of subpart C but would not be a hazard to air navigation; or

(3) Would exceed a standard of subpart C and further aeronautical study is necessary to determine whether it would be a hazard to air navigation, that the sponsor may request within 30 days that further study, and that, pending completion of any further study, it is presumed the construction or alteration would be a hazard to air navigation.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-4, 32 FR 12997, Sept. 13, 1967; Amdt. 77-5, 33 FR 5257, Apr. 2, 1968]

Subpart C—Obstruction Standards

§ 77.21 Scope

(a) This subpart establishes standards for determining obstructions to air navigation. It applies to existing and proposed manmade objects, objects of natural growth, and terrain. The standards apply to the use of navigable airspace by aircraft and to existing air navigation facilities, such as an air navigation aid, airport, Federal airway, instrument approach or departure procedures, or approved off-airway route. Additionally, they apply to a planned facility or use, or a change in an existing facility or use, if a proposal therefor is on file with the Federal Aviation Administratoin or an appropriate military service on the date the notice required by § 77.13(a) is filed.

(b) At those airports having defined runways with specially prepared hard surfaces, the primary surface for each such runway extends 200 feet beyond each end of the runway. At those airports having defined strips or pathways that are used regularly for the taking off and landing of aircraft and have been designated by appropriate authority as runways, but do not have specially prepared hard surfaces, each end of the primary surface for each such runway shall coincide with the corresponding end of the runway. At those airports, excluding seaplane bases, having a defined landing and takeoff area with no defined pathways for the landing and taking off of aircraft, a determination shall be made as to which portions of the landing and takeoff area are regularly used as landing and takeoff pathways. Those pathways so determined shall be considered runways and an appropriate primary surface as defined in § 77.25(c) will be considered as being longitudinally centered on each runway so determined, and each end of that primary surface shall coincide with the corresponding end of that runway.

(c) The standards in this subpart apply to the effect of construction or alteration proposals upon an airport if, at the time of filing of the notice required by § 77.13(a), that airport is—

(1) Available for public use and is listed in the Airport Directory of the current Airman's Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement; or

(2) A planned or proposed airport or an airport under construction, that is the subject of a notice or proposal on file with the Federal Aviation Administration, and, except for military airports, it is clearly indicated that that airport will be available for public use; or,

(3) An airport that is operated by an armed force of the United States.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-5, 33 FR 5257, Apr. 2, 1968; Amdt. 77-9, 36 FR 5970, Apr. 1, 1971]

§ 77.23 Standards for determining obstructions

(a) An existing object, including a mobile object, is, and a future object would be, an obstruction to air navigation if it is of greater height than any of the following heights or surfaces:

(1) A height of 500 feet above ground level at the site of the object.

(2) A height that is 200 feet above ground level or above the established airport elevation, whichever is higher, within 3 nautical miles of the established reference point of an airport, excluding heliports, with its longest runway more than 3,200 feet in actual length, and that height increases in the proportion of 100 feet for each additional nautical mile of distance from the airport up to a maximum of 500 feet.

(3) A height within a terminal obstacle clearance area, including an initial approach segment, a departure area, and a circling approach area, which would result in the vertical distance between any point on the object and an established minimum instrument flight altitude within that area or segment to be less than the required obstacle clearance.

(4) A height within an en route obstacle clearance area, including turn and termination areas, of a Federal airway or approved off-airway route, that would increase the minimum obstacle clearance altitude.

(5) The surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.25, § 77.28, or § 77.29. However, no part of the take-off or landing area itself will be considered an obstruction.

(b) Except for traverse ways on or near an airport with an operative ground traffic control service, furnished by an air traffic control tower or by the airport management and coordinated with the air traffic control service, the standards of paragraph (a) of this section apply to traverse ways used or to be used for the passage of mobile objects only after the heights of these traverse ways are increased by:

(1) Seventeen feet for an Interstate Highway that is part of the National System of Military and Interstate Highways where overcrossings are designed for a minimum of 17 feet vertical distance.

(2) Fifteen feet for any other public highway.

(3) Ten feet or the height of the highest mobile object that would normally traverse the road, whichever is greater, for a private road.

(4) Twenty-three feet for a railroad, and,

(5) For a waterway or any other traverse way not previously mentioned, an amount equal to the height of the highest mobile object that would normally traverse it.

[Amdt. 77-9, 36 FR 5970, Apr. 1, 1971]

§ 77.25 Civil airport imaginary surfaces.

The following civil airport imaginary surfaces are established with relation to the airport and to each runway. The size of each such imaginary surface is based on the category of each runway according to the type of approach available or planned for that runway. The slope and dimensions of the approach surface applied to each end of a runway are determined by the most precise approach existing or planned for that runway end.

(a) *Horizontal Surface.* A horizontal plane 150 feet above the established airport elevation, the perimeter of which is constructed by swinging arcs of specified radii

from the center of each end of the primary surface of each runway of each airport and connecting the adjacent arcs by lines tangent to those arcs. The radius of each arc is:

(1) 5,000 feet for all runways designated as utility or visual;

(2) 10,000 feet for all other runways. The radius of the arc specified for each end of a runway will have the same arithmetical value. That value will be the highest determined for either end of the runway. When a 5,000-foot arc is encompassed by tangents connecting two adjacent 10,000-foot arcs, the 5,000-foot arc shall be disregarded on the construction of the perimeter of the horizontal surface.

(b) *Conical surface.* A surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

(c) *Primary surface.* A surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each end of that runway; but when the runway has no specially prepared hard surface, or planned hard surface, the primary surface ends at each end of that runway. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline. The width of a primary surface is:

(1) 250 feet for utility runways having only visual approaches.

(2) 500 feet for utility runways having nonprecision instrument approaches.

(3) For other than utility runways the width is:

(i) 500 feet for visual runways having only visual approaches.

(ii) 500 feet for nonprecision instrument runways having visibility minimums greater than three-fourths statute mile.

(iii) 1,000 feet for a nonprecision instrument runway having a nonprecision instrument approach with visibility minimums as low as three-fourths of a statute mile, and for precision instrument runways.

The width of the primary surface of a runway will be that width prescribed in this section for the most precise approach or planned for either end of that runway.

(d) *Approach surface.* A surface longitudinally centered on the extended runway centerline and extending outward and upward from each end of the primary surface. An approach surface is applied to each end of each runway based upon the type of approach available or planned for that runway end.

(1) The inner edge of the approach surface is the same width as the primary surface and it expands uniformly to a width of:

(i) 1,250 feet for that end of a utility runway with only visual approaches;

(ii) 1,500 feet for that end of a runway other than a utility runway with only visual approaches;

(iii) 2,000 feet for that end of a utility runway with a nonprecision instrument approach;

(iv) 3,500 feet for that end of a nonprecision instrument runway other than utility, having visibilty minimums greater than three-fourths of a statute mile;

(v) 4,000 feet for that end of a non-precision instrument runway, other than utility, having a nonprecision instrument approach with visibility minimums as low as three-fourths statute mile; and

(vi) 16,000 feet for precision instrument runways.

(2) The approach surface extends for a horizontal distance of:

(i) 5,000 feet at a slope of 20 to 1 for all utility and visual runways;

(ii) 10,000 feet at a slope of 34 to 1 for all non-precision instrument runways other than utility; and

(iii) 10,000 feet at a slope of 50 to 1 with an additional 40,000 feet at a slope of 40 to 1 for all precision instrument runways.

(3) The outer width of an approach surface to an end of a runway will be that width prescribed in this subsection for the most precise approach existing or planned for that runway end.

(e) *Transitional surface.* These surfaces extend outward and upward at right angles to the runway centerline and the runway centerline extended at a slope of 7 to 1 from the sides of the primary surface and from the sides of the approach surfaces. Transitional surfaces for those portions of the precision approach surface which project through and beyond the limits of the conical surface, extend a distance of 5,000 feet measured horizontally from the edge of the approach surface and at right angles to the runway centerline.

[Amdt. 77-9, 36 FR 5970, Apr. 1, 1971; 36 FR 6741, Apr. 8, 1971]

§ 77.27 [Reserved]

§ 77.28 Military airport imaginary surfaces.

(a) *Related to airport reference points.* These surfaces apply to all military airports. For the purposes of this section a military airport is any airport operated by an armed force of the United States.

(1) *Inner horizontal surface.* A plane is oval in shape at a height of 150 feet above the established airfield elevation. The plane is constructed by scribing an arc with a radius of 7,500 feet about the centerline at the end of

each runway and interconnecting these arcs with tangents.

(2) *Conical surface.* A surface extending from the periphery of the inner horizontal surface outward and upward at a slope of 20 to 1 for a horizontal distance of 7,000 feet to a height of 500 feet above the established airfield elevation.

(3) *Outer horizontal surface.* A plane, located 500 feet above the established airfield elevation, extending outward from the outer periphery of the conical surface for a horizontal distance of 30,000 feet.

(b) *Related to runways.* These surfaces apply to all military airports.

(1) *Primary surface.* A surface located on the ground or water longitudinally centered on each runway with the same length as the runway. The width of the primary surface for runways is 2,000 feet. However, at established bases where substantial construction has taken place in accordance with a previous lateral clearance criteria, the 2,000-foot width may be reduced to the former criteria.

(2) *Clear zone surface.* A surface located on the ground or water at each end of the primary surface, with a length of 1,000 feet and the same width as the primary surface.

(3) *Approach clearance surface.* An inclined plane, symmetrical about the runway centerline extended, beginning 200 feet beyond each end of the primary surface at the centerline elevation of the runway end and extending for 50,000 feet. The slope of the approach clearance surface is 50 to 1 along the runway centerline extended until it reaches an elevation of 500 feet above the established airport elevation. It then continues horizontally at this elevation to a point 50,000 feet from the point of beginning. The width of this surface at the runway end

is the same as the primary surface, it flares uniformly, and the width at 50,000 is 16,000 feet.

(4) *Transitional surfaces.* These surfaces connect the primary surfaces, the first 200 feet of the clear zone surfaces, and the approach clearance surfaces to the inner horizontal surface, conical surface, outer horizontal surface or other transitional surfaces. The slope of the transitional surface is 7 to 1 outward and upward at right angles to the runway centerline.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-1, 30 FR 6713, May 18, 1965; Amdt. 77-9, 36 FR 5971, Apr. 1, 1971]

§ 77.29 Airport imaginary surfaces for heliports.

(a) *Heliport primary surface.* The area of the primary surface coincides in size and shape with the designated take-off and landing area of a heliport. This surface is a horizontal plane at the elevation of the established heliport elevation.

(b) *Heliport approach surface.* The approach surface begins at each end of the heliport primary surface with the same width as the primary surface, and extends outward and upward for a horizontal distance of 4,000 feet where its width is 500 feet. The slope of the approach surface is 8 to 1 for civil heliports and 10 to 1 for military heliports.

(c) *Heliport transitional surfaces.* These surfaces extend outward and upward from the lateral boundaries of the heliport primary surface and from the approach surfaces at a slope of 2 to 1 for a distance of 250 feet measured horizontally from the centerline of the primary and approach surfaces.

(Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-9, 36 FR 5971, Apr. 1, 1971; 36 FR 6741, Apr. 8, 1971]

Subpart D—Aeronautical Studies of Effect of Proposed Construction on Navigable Airspace

§ 77.31 Scope.

(a) This subpart applies to the conduct of aeronautical studies of the effect of proposed construction or alteration on the use of air navigation facilities or navigable airspace by aircraft. In the aeronautical studies, present and future IFR and VFR aeronautical operations and procedures are reviewed and any possible changes in those operations and procedures and in the construction proposal that would eliminate or alleviate the conflicting demands are ascertained.

(b) The conclusion of a study made under this subpart is normally a determination as to whether the specific proposal studies would be a hazard to air navigation.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-6, 33 FR 10843, July 31, 1968]

§ 77.33 Initiation of studies.

(a) An aeronautical study is conducted by the FAA:

(1) Upon the request of the sponsor or any construction or alteration for which a notice is submitted under subpart B of this part, unless that construction or alteration would be located within an antenna farm area established under subpart F of this part; or

(2) Whenever the FAA determines it appropriate.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-4, 32 FR 12997, Sept. 13, 1967]

§ 77.35 Aeronautical studies.

(a) The Regional Manager, Air Traffic Division of the region in which the proposed construction or alteration would be located, or his designee, conducts the areonautical study of the effect of the proposal upon the operation

of air navigation facilities and the safe and efficient utilization of the navigable airspace. This study may include the physical and electromagnetic radiation effect the proposal may have on the operation of an air navigation facility.

(b) To the extent considered necessary, the Regional Manager, Air Traffic Division or his designee:

(1) Solicits comments from all interested persons;

(2) Explores objections to the proposal and attempts to develop recommendations for adjustment of aviation requirements that would accommodate the proposed construction or alteration;

(3) Examines possible revisions of the proposal that would eliminate the exceeding of the standards in subpart C of this part; and

(4) Convenes a meeting with all interested persons for the purpose of gathering all facts relevant to the effect of the proposed construction or alteration on the safe and efficient utilization of the navigable airspace.

(c) The Regional Manager, Air Traffic Division or his designee issues a determination as to whether the proposed construction or alteration would be a hazard to air navigation and sends copies to all known interested persons. This determination is final unless a petition for review is granted under § 77.37.

(d) If the sponsor revises his proposal to eliminate exceeding of the standards of subpart C of this part, or withdraws it, the Regional Manager, Air Traffic Division, or his designee, terminates the study and notifies all known interested persons.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-6, 33 FR 10843, July 31, 1968; Amdt. 77-11, 54 FR 39292, Sept. 25, 1989]

§ 77.37 Discretionary review.

(a) The sponsor of any proposed construction or alteration or any person who stated a substantial aeronautical objection to it in an aeronautical study, or any person who has a substantial aeronautical objection to it but was not given an opportunity to state it, may petition he Administrator, within 30 days after issuance of the determination under § 77.19 or § 77.35 or revision or extension of the determination under § 77.39(c), for a review of the determination, revision, or extension. This paragraph does not apply to any acknowledgment issued under § 77.19(c)(1).

(b) The petition must be in triplicate and contain a full statement of the basis upon which it is made.

(c) The Administrator examines each petition and decides whether a review will be made and, if so, whether it will be:

(1) A review on the basis of written materials, including study of a report by the Regional Manager, Air Traffic Division of the aeronautical study, briefs, and related submissions by any interested party, and other relevant facts, with the Administrator affirming, revising, or reversing the determination issued under § 77.19, § 77.35 or § 77.39(c); or

(2) A review on the basis of a public hearing, conducted in accordance with the precedures prescribed in subpart E of this part.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-3, 32 FR 6970, May 6, 1967; Amdt. 77-11, 54 FR 39292, Sept. 25, 1989]

§ 77.39 Effective period of determination of no hazard.

(a) Unless it is otherwise extended, revised, or terminated, each final determination of no hazard made under this subpart or subpart B or E of this part expires 18

months after its effective date, regardless of whether the proposed construction or alteration has been started, or on the date the proposed construction or alteration is abandoned, whichever is earlier.

(b) In any case, including a determination to which paragraph (d) of this section applies, where the proposed construction or alteration has not been started during the applicable period by actual structural work, such as the laying of a foundation, but not including excavation, any interested person may, at least 15 days before the date the final determination expires, petition the FAA official who issued the determination to:

(1) Revise the determination based on new facts that change the basis on which it was made; or

(2) Extend its effective period.

(c) The FAA official who issued the determination reviews each petition presented under paragraph (b) of this section, and revises, extends, or affirms the determination as indicated by his findings

(d) In any case in which a final determination made under this subpart or subpart B or E of this part relates to proposed construction or alteration that may not be started unless the Federal Communications Commission issues an appropriate construction permit, the effective period of each final determination includes—

(1) The time required to apply to the Commission for a construction permit but not more than 6 months after the effective date of the determination; and

(2) The time necessary for the Commission to process the application except in a case where the Administrator determines a shorter effective period is required by the circumstances.

(e) If the Commission issues a construction permit, the final determination is effective until the date pre-

scribed for completion of the construction. If the Commision refuses to issue a construction permit, the final determination expires on the date of its refusal.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-5, 33 FR 5257, Apr. 2, 1968]

Subpart E—Rules of Practice for Hearings Under Subpart D

§ 77.41 Scope.

This subpart applies to hearings held by the FAA under titles I, III, and X of the Federal Aviation Act of 1958 (49 U.S.C. subchapters I, III, and X), on proposed construction or alteration that affects the use of navigable airspace.

§ 77.43 Nature of hearing.

Sections 4, 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1003, 1004, 1006, and 1007) do not apply to hearings held on proposed construction or alteration to determine its effect on the safety of aircraft and the efficient use of navigable airspace because those hearings are factfinding in nature. As a factfinding procedure, each hearing is nonadversary and there are no formal pleadings or adverse parties.

§ 77.45 Presiding officer.

(a) If, under § 79.37, the Administrator grants a public hearing on any proposed construction or alteration covered by this part, the Director, Air Traffic Operations Service designates an FAA employee to be the presiding officer at the hearing.

(b) The presiding officer may:

(1) Give notice of the date and location of the hearing and any prehearing conference that may be held;

(2) Administer oaths and affirmations;

(3) Examine witnesses;

(4) Issue subpoenas and take depositions or have them taken;

(5) Obtain, in the form of a public record, all pertinent and relevant facts relating to the subject matter of the hearing;

(6) Rule, with the assistance of the legal officer, upon the admissibility of evidence;

(7) Regulate the course and conduct of the hearing; and

(8) Designate parties to the hearing and revoke those designations.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-11, 54 FR 39292, Sept. 25, 1989]

§ 77.47 Legal officer.

The Chief Counsel designates a member of his staff to serve as legal officer at each hearing under this subpart. The legal officer may examine witnesses and assist and advise the presiding officer on questions of evidence or other legal questions arising during the hearing.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended at 38 FR 26444, Sept. 17, 1973]

§ 77.49 Notice of hearing.

In designating a time and place for a hearing under this subpart the presiding officer considers the needs of the FAA and the convenience of the parties and witnesses. The time and place of each hearing is published in the "Notices" section of the FEDERAL REGISTER before the date of the hearing, unless the notice is impractical or unnecessary.

§ 77.51 Parties to the hearing.

The presiding officer designates the following as parties to the hearing—

(a) The proponent of the proposed construction or alteration.

(b) Those persons whose activities would be substantially affected by the proposed construction or alteration.

§ 77.53 Prehearing conference.

(a) The presiding officer may, in his discretion, hold a prehearing conference with the parties to the hearing and the legal officer before the hearing.

(b) At the direction of the presiding officer, each party to a prehearing conference shall submit a brief written statement of the evidence he intends to provide through his witnesses and by questioning other witnesses at the hearing, and shall provide enough copies of the statement so that the presiding officer may keep three for the FAA and give one to each other party.

(c) At the prehearing conference, the presiding officer reduces and simplifies the subject matter of the hearing so far as possible and advises the parties of the probable order of presenting the evidence.

§ 77.55 Examination of witnesses.

(a) Each witness at a hearing under this subpart shall, after being sworn by the presiding officer, give his testimony under oath.

(b) The party for whom a witness, other than an employee of the FAA, is testifying shall examine that witness. After that examination, other parties to the hearing may examine the witness, in the order fixed by the presiding officer. The presiding officer and the legal officer may then examine the witness. The presiding officer may

grant any party an additional opportunity to examine any witness, if that party adequately justifies the additional examination.

(c) The legal officer examines each FAA employee who is a witness, before the other parties examine him. After that examination, the order prescribed in paragraph (b) of this section applies. An FAA employee may testify only as to facts within his personal knowledge and the application of FAA regulations, standards, and policies.

§ 77.57 Evidence.

(a) The presiding officer receives all testimony and exhibits that are relevant to the issues of the hearing. So far as possible, each party shall submit enough copies of his exhibits that the presiding officer may keep three copies for the FAA and give one to each other party.

(b) The presiding officer excludes any testimony that is irrelevant, unduly repetitious, or consists of statements made during an aeronautical study in an effort to reconcile or compromise aviation or construction or alteration requirements. A party to the hearing may object to the admission of evidence only on the ground that it is irrelevant.

§ 77.59 Subpoenas of witnesses and exhibits.

(a) The presiding officer of a hearing may issue subpoenas for any witness or exhibit that he determines may be material and relevant to the issues of the hearing. So far as possible, each party to the hearing shall provide the witnesses and exhibits that he intends to present at the hearing.

(b) If any party to the hearing is unable to provide his necessary witnesses and exhibits, he shall advise the presiding officer far enough in advance that the presiding officer can determine whether he should issue subpoenas for the desired witnesses or exhibits.

§ 77.61 Revision of construction or alteration proposal.

(a) The sponsor of any proposed construction or alteration covered by this part may revise his proposal at any time before or during the hearing. If he revises it, the presiding officer decides whether the revision affects the proposal to the extent that he should send it to the Administrator for a redetermination of the need for a hearing.

(b) If the presiding officer decides that it does not need to be resubmitted to the Administrator, he advises the parties of the revised proposal and takes the action necessary to allow all parties to effectively participate in the hearing on the revised proposal. Without limiting his discretion, the presiding officer may recess and reconvene the hearing, or hold another prehearing conference.

§ 77.63 Record of hearing.

(a) Each hearing is recorded verbatim by an official reporter under an FAA contract. The transcript, and all exhibits, become a part of the record of the hearing.

(b) Any person may buy a copy of the transcript of the hearing from the reporter at the price fixed for it.

(c) The presiding officer may allow any party to withdraw an original document if he submits authenticated copies of it.

(d) Any person may buy, from the FAA, photostatic copies of any exhibit by paying the copying costs.

(e) A change in the official transcript of a hearing may be made only if it involves an error of substance. Any recommendation to correct the transcript must be filed with the presiding officer within 5 days after the hearing closes. The presiding officer reviews each request for a correction to the extent he considers appropriate and shall make any revisions that he finds appropriate as a result of that review.

§ 77.65 Recommendations by parties.

Within 20 days after the mailing of the record of hearing by the official reporter, or as otherwise directed by the presiding officer, each party may submit to the presiding officer five copies of his recommendations for a final decision to be made by the Administrator.

§ 77.67 Final decision of the Administrator.

After reviewing the evidence relevant to the questions of fact in a hearing, including the official transcript and the exhibits. The Administrator resolves all these questions, based on the weight of evidence, and makes his determination, stating the basis and reasons for it. He then issues an appropriate order to be served on each of the parties.

§ 77.69 Limitations on appearance and representation.

(a) A former officer or employee of the FAA may not appear on behalf of, or represent, any party before the FAA in connection with any matter to which this part applies, if he considered or passed on that matter while he was an officer or employee of the FAA.

(b) A person appearing before the FAA on any matter to which this part applies may not, in connection with that appearance, knowingly accept assistance from, or share fees with, any person who is prohibited by paragraph (a) of this section, from appearing himself on that matter.

(c) A former official or employee of the FAA may not, within 6 months after he ceases to be such an officer or employee, appear before the FAA on behalf of, or represent, any party in connection with any proceeding that was pending under this part while he was an officer or employee of the FAA, unless he obtains written consent from an appropriate officer of the FAA, based on a verified showing that he did not personally consider the mat-

ter concerned or gain particular knowledge of it while he was an officer or employee of the FAA.

Subpart F—Establishment of Antenna Farm Areas

§ 77.71 Scope.

(a) This subpart establishes antenna farm areas in which antenna structures may be grouped to localize their effect on the use of navigable airspace.

(b) It is the policy of the FAA to encourage the use of antenna farms and the single structure-multiple antenna concept for radio and television towers whenever possible. In considering proposals for establishing antenna farm areas, it considers as far as possible the revision of aeronautical procedures and operations to accommodate antenna structures that will fulfill broadcasting requirements.

§ 77.73 General provisions.

(a) An antenna farm area consists of a specified geographical location with established dimensions of area and height, where antenna towers with a common impact on aviation may be grouped. Each such area is established by appropriate rule making action.

(b) Each proposal for an antenna farm area is evaluated on the basis of its effect on the use of navigable airspace. The views of the Federal Communications Commission are requested on the effect that each establishment of an antenna farm area would have on its statutory responsibilities. Any views submitted by it are fully considered before the antenna farm concerned is established. If the Commission advises that the establishment of any proposed antenna farm area would interfere with its statutory responsibility, the proposed area is not established.

(c) The establishment of an antenna farm area is considered whenever it is proposed by:

(1) The FAA;

(2) The Federal Communications Commission;

(3) The sponsor of a proposed antenna tower; or

(4) Any other person having a substantial interest in a proposed antenna tower.

[Doc. No. 1882, 30 FR 1839, Feb. 10, 1965, as amended by Amdt. 77-10, 37 FR 4705, Mar. 4, 1972]

§ 77.75 Establishment of antenna farm areas.

The airspace areas described in the following sections of this subpart are established as antenna farm areas.

IN THE SUPREME COURT
OF THE STATE OF IOWA

No. 90-1845

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,
Plaintiffs-Appellants,

vs.

THE CITY OF IOWA CITY, IOWA, and
JOHNSON COUNTY, IOWA,
Defendants-Appellees.

APPLICATION FOR LIMITED REMAND

[Filed Mar. 31, 1992]

Plaintiffs-Appellants make application to the Court for limited remand to the Trial Court on the basis of newly acquired evidence and state:

1. The decision of the Trial Court was filed November 1, 1990, from which Plaintiffs-Appellants appealed to the Supreme Court of Iowa.

2. The case was transferred to the Iowa Court of Appeals as Docket No. 1-436/90-1845.

3. The decision of the Iowa Court of Appeals was filed December 31, 1991.

4. Plaintiffs-Appellants and Defendants-Appellees filed for further review before the Supreme Court of Iowa which was granted by order entered February 28, 1992.

5. Oral argument was granted by the Supreme Court of Iowa and has been set for April 6, 1992.

6. Although Plaintiffs-Appellants claim and the Iowa Court of Appeals found that a physical taking had occurred, one of the issues raised by Defendants-Appellees and specified by the Iowa Court of Appeals involves the exhaustion of administrative remedies.

7. Under the terms and conditions of the "Johnson County Iowa City Airport Zoning Ordinance" no special exception or variance from the terms of the ordinance can be granted without the prior approval of the Federal Aviation Administration (FAA).

8. Counsel for Plaintiffs-Appellants has attempted on several occasions to ascertain whether an application for variance or special exception would be entertained and considered by FAA, and a response was finally received from FAA on March 26, 1992, a copy of which is attached hereto and made a part hereof by this reference.

9. Considering the elevation of the terrain of the property belonging to Plaintiffs-Appellants as shown by the exhibits and testimony in this case, it is obvious that construction of strutcures on the greater portion of Plaintiffs-Appellants' property would penetrate the approach slope and would be deemed a hazard by the FAA which would proceed to prevent the construction.

10. The referral of this matter to the Trial Court on the basis of a limited remand would enable Plaintiffs-Appellants to present evidence concerning the futility of applying for permission to construct any structure which would penetrate the approach slope established by the airport ordinance and the exhaustion of administrative remedies, therefore, would not be required.

By reason of the foregoing, Plaintiffs-Appellants ask that this matter be remanded to the Trial Court for consideration of evidence pertaining to any application by Plaintiffs-Appellants for a special exception or variance based upon the evidence which has been produced at trial showing the expected height of houses and commercial buildings.

Dated this 30th day of March, 1992.

MEARDON, SUEPPEL, DOWNER
& HAYES

By /s/ William L. Meardon
WILLIAM L. MEARDON
122 South Linn Street
Iowa City, Iowa 52240
Telephone: 319/338-9222
Attorneys for Appellants

U.S. DEPARTMENT
OF TRANSPORTATION
FEDERAL AVIATION
ADMINISTRATION

Central Region
Iowa, Kansas,
Missouri, Nebraska

601 E. 12th Street
Kansas City, Missouri 64106

Mar. 24, 1992

Meardon, Sueppel, Downer & Hayes
ATTN: Mr. William L. Meardon
122 S. Linn Street
Iowa City, IA 52240

Dear Mr. Meardon:

This is in response to your letter, dated December 26, 1991, concerning the development of property around and adjacent to the Iowa City Municipal Airport.

The Iowa City Airport is a public use airport and is protected by Federal Aviation Regulations to insure maximum safety to air navigation.

Part 77 of the Federal Aviation Regulations specifically deals with any obstructions in the approach slope or any airport imaginary surface. If we received a proposal to be located in the approach trapezoid and it exceeded the 34:1 slope, we would determine it to be a hazard to air navigation and proceed with steps necessary to prevent its construction.

The power line located along the south side of Highway 1 can either be buried or relocated outside the trapezoid. Under no circumstances would we consider the power line as acceptable shielding for other structures.

We would be happy to review any construction your clients proposed, as long as they provide us latitude/longtitude, height of structures, and reasonable ground elevations. We would not require any extensive engineering studies. If our review indicated a maximum height not to exceed, we would inform the sponsor and include it as a condition of the determination.

If we can be of further assistance, feel free to contact Kathy Randolph, ACE-530c, at (816) 426-3408.

Sincerely,

/s/ Terry Bolerjack
TERRY BOLERJACK
Acting Manager, System Management Branch

Supreme Court, U.S.
FILED
APR 23 1993
OFFICE OF THE CLERK

No. 92-1545

In The

Supreme Court of the United States

October Term, 1992

DEAN A. FITZGARRALD AND
PHYLLIS FITZGARRALD,

Petitioners,

v.

CITY OF IOWA CITY, IOWA, AND
JOHNSON COUNTY, IOWA,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Iowa

BRIEF FOR THE RESPONDENT CITY OF IOWA CITY, IOWA IN OPPOSITION

David E. Brown
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Attorney for Respondent
City of Iowa City, Iowa

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 92-1545

In The

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October Term, 1992

DEAN A. FITZGARRALD AND
PHYLLIS FITZGARRALD,

Petitioners,

v.

CITY OF IOWA CITY, IOWA, AND
JOHNSON COUNTY, IOWA,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Iowa

BRIEF FOR THE RESPONDENT CITY OF IOWA CITY, IOWA IN OPPOSITION

Respondent City of Iowa City, Iowa, respectfully opposes the Petition for a Writ of Certiorari to review the opinion of the Supreme Court of Iowa rendered on November 25, 1992.

STATEMENT OF THE CASE

The Petitioners (hereinafter referred to as "Fitzgarrald") own approximately 10 acres of property located northwest of Runway 6-24 of the Iowa City Municipal

Airport. When Fitzgarrald purchased this property in the 1940's, the Iowa City Municipal Airport was already in existence and operating. Besides building a home on this land, Fitzgarrald also owns and operates a mobile home park and has operated said mobile home park on the subject property for many years. The mobile home park is a non-conforming use under the provisions of the Johnson County Zoning Ordinance which was adopted in 1960.

In 1984, the City of Iowa City initiated a runway extension project to extend Runway 6-24. Initially, this runway was planned to be extended 1,000 feet; however, the ultimate extension of Runway 6-24 was only 355 feet.

Also, in 1984, the City of Iowa City, in conjunction with Johnson County, adopted the Johnson County/Iowa City Airport Zoning Ordinance under the authority of Chapter 329, Code of Iowa. The purpose of the Ordinance was to exercise the powers granted to municipalities under Chapter 329 relating to the restriction of airport hazards in the vicinity of airports by establishing airport overlay zones in which airport hazards and incompatible uses are prohibited.

In drafting the Airport Zoning Ordinance with Johnson County, the City of Iowa City attempted to duplicate the pre-existing Federal regulations regarding land uses and approach restrictions around Federally-funded airports, and the City attempted to be no more restrictive than said pre-existing Federal regulations. For example, the 34-to-1 approach slope restrictions found in the Johnson County/Iowa City Airport Zoning Ordinance are identical to the Federal Aviation Administration (FAA)

regulations found at 14 C.F.R. Part 77 (Pet. App. 116a-146a).

In 1990, the City of Iowa City and Johnson County amended the Airport Zoning Ordinance to coincide with the fact that Runway 6-24 was only extended 355 feet, rather than the 1,000 feet extension originally planned. This 1990 amendment resulted in a reduced impact over the Fitzgarrald property in regard to height restrictions. Under the amended Ordinance, the Fitzgarrald residence penetrated 6.9 feet into the specified approach slope. However, the amended Ordinance, like the 1984 Ordinance, allowed the Fitzgarrald's non-conforming uses to continue without alteration. Fitzgarrald continues to use the subject property today, for residential and mobile home park purposes, as it was being used before the adoption of the 1984 Ordinance and the 1990 amendment.

The Iowa District Court ruled on November 1, 1990, holding that no "taking" had occurred and denying Fitzgarrald's Petition for Writ of Mandamus (Pet. App. 42a-48a). In its Ruling, the Court noted that the "Airport Zoning Ordinance merely assimilated the FAA restrictions into a municipal code and did not tighten the restrictions on the Fitzgarrald property any more than was already done by the FAA regulations." *Id.* at 45a. The Court added that "Even if the Municipal Airport Zoning Ordinance had not been enacted, the Fitzgarralds would have to have FAA approval before they could alter the use of their property." *Id.*

The Court addressed the claim of physical invasion and held that the factual record in this case contradicted Fitzgarrald's belief that the 355 foot runway extension

had resulted in increased air traffic. In summary, the Court stated that the Fitzgarralds "purchased their property when the airport was in existence and situated immediately next to them. They began their business as mobile home court operators prior to the enactment of the Airport Zoning Ordinance and have been able to continue that use up to the present time. They are able to continue that use into the indefinite future. They have not intended or attempted to change the use of their property since the enactment of the Airport Zoning Ordinance. The Ordinance(s) have not had an effect on their property and have not placed any more restrictions on their land than was already in place by the FAA." *Id.* at 45a-46a.

Fitzgarrald appealed the Iowa District Court Ruling to the Iowa Supreme Court, and the Iowa Supreme Court transferred the case to the Iowa Court of Appeals. The Court of Appeals filed its decision on December 31, 1991, affirming the District Court decision by denying the Writ. The Court of Appeals held that Fitzgarrald was not entitled to a Writ of Mandamus because Fitzgarrald continued to use the property as before and had not applied for a variance available under the Ordinance; accordingly, the Court held that the matter was not ripe for determination. (Pet. App. 55a).

Fitzgarrald applied for further review to the Iowa Supreme Court. The City of Iowa City and Johnson County also sought further review of the Court of Appeals decision because, despite the Court's affirmance of the lower court ruling, the Court of Appeals found that there had been a "taking". The Iowa Supreme Court granted the respective applications for further review. On June 17, 1992, the Iowa Supreme Court filed a ruling

vacating the Court of Appeals decision and affirming the Iowa District Court ruling denying the Writ of Mandamus (Pet. App. 59a). The Iowa Supreme Court addressed the Fitzgarrald claims of regulatory taking and physical invasion. In regard to the regulatory taking claim, the Court noted that Fitzgarrald made the same use of the property both before and after the enactment of the Ordinance. The Court found that Fitzgarrald failed to demonstrate that other feasible uses of the property would be available to them or to a potential buyer, absent the challenged Airport Zoning Ordinance. *Id.* at 65a-66a. The Court stated "We are unable to conclude that the Airport Zoning Ordinances upon which Plaintiffs' 'taking' claim is based have frustrated any investment backed expectation for the use of their land." *Id.* at 66a.

In regard to Fitzgarrald's physical invasion claim, the Court noted the finding of the District Court that there were fewer flights over the Fitzgarrald property after the runway extension was completed than there were before that project was initiated. The Iowa Supreme Court also stated that the record was devoid of any evidence showing either the frequency or approximate altitudes of planes flying over the Fitzgarrald land. *Id.* at 69a. The Court added that although Fitzgarrald testified as to some inconvenience from airport noise, she did not fix the frequency of such occurrences nor indicate that this occurred on a regular basis. *Id.* The Court went on to state that perhaps the most significant fact for the purposes of Fitzgarrald's physical invasion claim was that the loss of value evidence presented by Fitzgarrald related entirely to the regulatory taking claim. *Id.* at 69a-70a. The Court noted that none of the witnesses at trial testified that

overflying aircraft adversely affected the market value of the Fitzgarrald property.

On June 30, 1992, Fitzgarrald filed a Petition for Rehearing in the Iowa Supreme Court. On October 2, 1992, the Iowa Supreme Court granted Fitzgarrald's Petition for Rehearing and withdrew its prior opinion.

The Iowa Supreme Court issued its final opinion in this case on November 25, 1992, again affirming the District Court and vacating the decision of the Court of Appeals. The Court again rejected the claims of regulatory taking and physical invasion, using language nearly identical to that found in the June 17, 1992 decision. (Pet. App. 1a-12a). In support of its denial of the Fitzgarrald claims, however, the Court frequently cited the recent United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed. 2d 798, 112 S. Ct. 2886 (1992).

Fitzgarrald filed another Petition for Rehearing on December 9, 1992. The Court denied that Petition by Order dated December 23, 1992.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE IOWA SUPREME COURT CORRECTLY APPLIED FEDERAL LAW IN DENYING PETITIONERS' PHYSICAL INVASION CLAIM.

In regard to Petitioners' physical invasion claim, the Iowa Supreme Court, in the Ruling filed November 25, 1992, concluded that there was a deficiency of proof as to the element of "measurable decrease in market value"

due to overflying aircraft. (Pet. App. 9a). In so holding, the Iowa Supreme Court found that the District Court correctly rejected Petitioner's physical invasion claim, and the Court of Appeals erred in concluding otherwise.

Petitioner now argues to this Court that the Iowa Supreme Court interpreted Federal law in a manner inconsistent with prior decisions of this Court in denying the physical invasion claim. Petitioner argues that the Iowa Supreme Court applied the wrong standard in concluding that the Petitioner failed to generate a fact question on the physical invasion claim.

A careful reading of the Iowa Supreme Court Ruling of November 25, 1992, shows that the Court did apply the proper standard of law in holding that there was no "taking" by physical invasion. Based on the factual record in this case, the Iowa Supreme Court correctly concluded that the Petitioners failed to meet the requisite burden of proof to establish their claim of physical invasion in the context of a mandamus action.

In its decision, the Iowa Supreme Court noted that it had previously recognized mandamus as a procedural device to compel condemnation of an avigation easement. See, *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84 (Iowa 1973). In that prior decision, the Iowa Supreme Court recognized that an avigation easement may be required when flights are so low and so frequent as to amount to a taking of property. The Iowa Supreme Court went on to note, however, that every noise or interference with property as a result of overflying aircraft does not constitute a taking and that land owners must endure "some level of inconvenience, discomfort, and loss of peace and quiet

that can be reasonably anticipated by members of a progressive society." (Pet. App. 6a).

The Iowa Supreme Court stated that although some courts have concluded that the issue of whether a taking has occurred in airport overflight cases is an issue of law for the mandamus court to decide in the first instance, the better rule is that the mandamus court should only determine whether a factual issue exists that would permit a condemnation commission or a jury on appeal of an award to find an intrusion that produced a measurable decrease in the property's market value. (Pet. App. 7a). It was this standard that was applied by the Iowa Court in this case.

In its Ruling, the Iowa Supreme Court cited this Court which observed in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed. 2d 798, 812, 112 S. Ct. 2886, 2893 (1992):

> No matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasion]. (Pet. App. 7a).

A permanent physical invasion is one of two discreet categories of regulatory action which this Court has deemed compensable without case-specific inquiry into the public interest advanced in support of the restraint. *Id.* The second situation in which this Court has found categorical treatment appropriate is where regulation denies all economically-beneficial or productive use of the land. *Id.* at 813.

This Court's holding in *Lucas* in regard to permanent physical invasion is a refinement of prior decisions,

including *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed. 2d 868, 102 S. Ct. 3164 (1982), in which this Court determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking. Also, this Court had previously held that in some circumstances, overflying aircraft may amount to a physical invasion. *United States v. Causby*, 238 U.S. 256, 261, 66 S. Ct. 1062, 1065, 90 L.Ed. 1206, 1210 (1946).

The Iowa Supreme Court accepted these principles of law and therefore accepted Petitioners' argument that, on their physical invasion claim, they were not required to try their eminent domain case in full in the mandamus action; rather, they were only required to present enough evidence to generate a fact issue as to whether the overflying aircraft produced a measurable decrease in property value. (Pet. App. 8a).

Since mandamus is an equitable action, the Iowa Supreme Court's review in this case was de novo. In its Ruling, the court stated that the record was devoid of any evidence showing either the frequency or approximate altitudes of planes flying over Petitioners' lands; the court also noted that Defendants presented evidence that planes were taking off and landing with approximately the same frequency and altitude before and after the runway extension and that three pilots, who testified for Defendants, indicated that after the runway was extended, they altered their approach turns so as to stay farther away from Petitioners' property. (Pet. App. 9a).

In contrast to this evidence, the court noted that although Petitioner Phyllis Fitzgarrald testified as to some inconvenience from airport noise, she did not fix the frequency of such occurrences nor indicate that this occurred on a regular basis. Further, the court noted that it was perhaps most significant that the only loss of value evidence presented by Petitioners was related entirely to Petitioners' regulatory taking claim, not to the physical invasion claim. *Id.* at 9a.

The Iowa Supreme Court, based on its review of the record in this case, was correct to conclude that there was a deficiency of proof as to the element of "measurable decrease in market value" allegedly due to overflying aircraft. *Id.* Based on the factual record in this case, the Iowa Supreme Court correctly applied federal law consistent with prior decisions of this Court in affirming the District Court's rejection of Petitioners' physical invasion claim.

II. PETITIONERS' APPLICATION FOR LIMITED REMAND IS RENDERED MOOT BY THE IOWA SUPREME COURT'S REJECTION OF PETITIONERS' REGULATORY TAKING CLAIM.

Prior to the April 6, 1992 oral argument before the Iowa Supreme Court, Petitioners filed an Application for Limited Remand (Pet. App. 147a). This Application for Limited Remand was based upon a letter, dated March 24, 1992, to Petitioners' attorney from Terry Bolerjack, Acting Manager in the System Management Branch of the Federal Aviation Administration in Kansas City, Missouri. Petitioners contend that certain information in said letter

constitutes "new evidence" in support of Petitioners' regulatory taking claim. Petitioners are apparently interpreting certain statements in said letter to mean that Petitioners would never be able to engage in new construction on their property which would penetrate the 34-to-1 approach slope.

In the first place, the Bolerjack letter (Pet. App. 150a-151a) does not specifically address the Petitioners' property, and Respondent submits that the Petitioners are taking this letter out of context in an attempt to buttress their claim. The Respondent City of Iowa City clarified the context in which the Bolerjack letter was written by filing with the Iowa Supreme Court an Answer to Petition for Rehearing on August 11, 1992. (Resp. App. 1). In connection with its Answer to Petition for Rehearing, the Respondent City of Iowa City submitted a more-recent letter, dated August 5, 1992, from the Federal Aviation Administration to clarify certain statements made in the previous Bolerjack letter. (Resp. App. 10). The August 5, 1992 letter from the FAA notes that while the FAA would normally consider a structure that exceeded the 34-to-1 slope to be a hazard, in actual practice, there are exceptions as determined by the facts of each case. Said letter goes on to note that there is a fitness center at the approach end of Runway 6 which exceeds the 34-to-1 approach slope by five feet, but that said fitness center was not considered to have been a hazard. *Id.*

In any event, Petitioner's Motions for Limited Remand have now been ruled upon by the Iowa Supreme Court by Order filed April 19, 1993. The Iowa Supreme Court has ruled that "the Motions for Limited Remand that were filed by Appellants following our grant of

further review were rendered moot by the opinion filed in this cause on November 25, 1992, and consequently no Ruling on said Motions is required." (Resp. App. 12).

As noted in the Iowa Supreme Court Ruling of November 25, 1992, Petitioners have never submitted any application for new development of the subject property. Fitzgarrald continues to use the property as her residence and as a mobile home park which is the same use which Petitioners have made of the property for many years. Petitioners are permitted to continue making such use of their property under the Airport Zoning Ordinance. Until such time that Petitioners are denied some future development of their property because of penetration into the approach slope, it is premature for Petitioners to make any claim of "taking" based on the approach slope restrictions.

In rejecting Petitioners' regulatory taking claim, the Iowa Supreme Court correctly applied the principle set forth in the *Lucas* decision recently filed by this Court. The Iowa Supreme Court correctly concluded that the Petitioner continues to have an economically viable use of her property even though its market value may have been, to some extent, diminished as a result of the Airport Zoning Ordinance. The court correctly concluded that the alleged deprivation was much less severe than that which is required to support a constitutional taking.

CONCLUSION

For the reasons set forth above, the Respondent City of Iowa City, Iowa respectfully requests this Court to deny Fitzgarrald's Petition for a Writ of Certiorari.

Respectfully submitted,

David E. Brown
Hayek, Hayek & Brown
Bremer Building
120½ East Washington Street
Iowa City, Iowa 52240
(319) 337-9606

Attorney for Respondent
City of Iowa City, Iowa

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF IOWA

NO. 90-1845

DEAN A. FITZGARRALD and
PHYLLIS FITZGARRALD,

Plaintiffs-Appellants,

vs.

THE CITY OF IOWA CITY, IOWA, and
JOHNSON COUNTY, IOWA,

Defendants-Appellees.

ANSWER TO PETITION FOR REHEARING

[Filed August 11, 1992]

Per the Court's Orders of July 17, 1992 and July 31, 1992, Defendant-Appellee City of Iowa City answers the Petition for Rehearing, limited only to paragraph 4 of that Petition, and states:

1. Contrary to the Plaintiffs' claim, the FAA letter of March 24, 1992 does not show that the Plaintiffs could not have residential development on their land.

2. The Plaintiffs have taken the March 24, 1992 letter out of context; to show the context in which the March 24, 1992 letter was written, attached hereto as Exhibits "A" and "B", respectively, are copies of a November 15, 1991 letter from Christopher R. Blum to Paul V. Anderson, and a copy of the December 26, 1991 letter from William L. Meardon to Christopher R. Blum. These letters show that the FAA letter of March 24, 1992 was not written in

reference to the Fitzgarrald property; rather, it was written as a followup to the letter of November 15, 1991 in regard to an Aeronautical Study of a completely different property owned by another client of Mr. Meardon.

3. Based on said Aeronautical Study of that other property, the FAA concluded that construction on certain lots of said property would constitute a hazard to air navigation, and it was in this context that the letter of March 24, 1992 was written.

4. For the purpose of seeking clarification in this letter, the undersigned attorney for the City of Iowa City wrote a letter to the FAA, dated August 4, 1992. Attached hereto as Exhibit "C" is a copy of said August 4, 1992 letter. In response to that letter, the FAA wrote a letter to the undersigned attorney, dated August 5, 1992. Attached hereto as Exhibit "D" is a copy of the August 5, 1992 letter.

5. The August 5, 1992 letter clarifies and confirms that a structure which exceeds the 34:1 approach slope will not necessarily be determined to be a hazard. Such determination depends upon the facts in each individual case.

6. Before any such determination can be made, however, the FAA must first perform an Aeronautical Study. The August 5, 1992 letter confirms that no such study has ever been performed in regard to the Fitzgarrald property because the FAA has never received any notices of proposed construction or alteration from the Plaintiffs.

7. It is not possible to know precisely whether or how any future proposed residential use would be

impacted by the subject airport zoning ordinance. Defendant-Appellees assert that Plaintiffs will need to present a plan, permit application or through some other vehicle, suggest future development, if any is intended. Clearly, future development is not proscribed.

8. Plaintiffs' taking claim is premature. Plaintiffs have made no effort to develop their property in any way different from the way in which it has been used for years and in which it is currently being used. There is nothing in the record to show that Plaintiffs are absolutely prohibited from any future residential development of their property as a result of the airport zoning ordinance.

9. As stated in the August 5, 1992 letter from the FAA, the FAA would be happy to review any proposal or alteration by any individual wishing to develop property which requires notification under FAR Part 77 standards. A penetration of the 34:1 approach slope does not mean, in and of itself, that a future residential development proposal would be denied.

WHEREFORE, Defendant-Appellee City of Iowa City requests that the Petition for Rehearing be denied.

Respectfully submitted this 10th day of August, 1992.

/s/ David E. Brown
David E. Brown
Hayek, Hayek & Brown
Bremer Building
120½ East Washington Street
Iowa City, Iowa 52240
(319) 337-9606.

ATTORNEY FOR DEFENDANT-APPELLEE CITY OF IOWA CITY

EXHIBIT "A"

LOGO
U.S. Department
of Transportation

**Federal Aviation
Administration**

Central Region
Iowa, Kansas,
Missouri, Nebraska

601 E. 12th Street
Kansas City, Missouri 64106

NOV 15 1991

Mr. Paul V. Anderson
MMS Consultants, Inc.
465 Highway #1 West
Iowa City, IA 52246

Dear Mr. Anderson:

This is to acknowledge your two Notices of Proposed Construction or Alteration dated August 15, 1991, for a residential and business development southwest of Iowa City Municipal Airport, and your letter of November 11, 1991, addressed to Ms. Kathy Randolph.

We have completed our Aeronautical Studies of the proposed construction; Lot 1 under Study No. 91-ACE-0588-OE, Lots 2, 35, 22, 3, 34, and 23 under 91-ACE-0589-OE. We have determined that any construction on Lots 1, 2, 35, 3, or 34 would be a hazard to air navigation. The ground level at these lots is at or exceeds the 34:1 approach surface required for the instrument approach on file for Iowa City Municipal Airport Runway 6. On Lot 22 a structure not to exceed 4 ft. would not be considered a hazard. On Lot 23 a structure not to exceed 13 ft. would not be considered a hazard.

The elevation at the approach end of Runway 6 is 668 ft., not 681 ft. as shown in your calculations. The primary surface of the runway extends 200 ft. beyond the actual concrete surface, making your proposed construction 200 ft. closer to the runway than you calculated.

We do not consider the power line along the south side of Highway #1 a permanent structure. This line can be buried in conjunction with establishing the instrument approach to Runway 6.

This determination is subject to review if a petition is filed by the sponsor on or before December 15, 1991. In the event a petition for review is filed it should be submitted in triplicate to the Manager, Airspace Branch, ATP-240, Federal Aviation Administration, Washington, D.C. 20591, and contain a full statement of the basis upon which it is made.

This determination becomes final on December 25, 1991, unless a petition for review is timely filed, in which case the determination will not become final pending disposition of the petition. Interested parties will be notified of the grant of any review.

Sincerely,

/s/ Illegible
for Christopher R. Blum
Manager, System Management Branch

EXHIBIT "B"

MEARDON, SUEPPEL, DOWNER & HAYES
LAWYERS

122 South Linn Street

Iowa City, Iowa 52240

December 26, 1991

William L. Meardon
William F. Sueppel
Robert N. Downer
James P. Hayes
James D. McCarragher
Mark T. Hamer
Thomas D. Hobart
Margaret T. Lainson
Douglas D. Ruppert
Paul J. McAndrew, Jr.
Timothy J. Krumm
William J. Sueppel
Charles A. Meardon

Fax: (319) 338-7250
Telephone: (319) 338-9222

Mr. Christopher R. Blum
Manager, System Management Branch
United States Department of Transportation
Federal Aviation Administration
601 East 12th Street
Kansas City, Missouri 64106

Dear Mr. Blum:

Enclosed please find a copy of a letter dated November 15, 1991, addressed to Paul B. Anderson, an engineer representing one of my clients.

We have several clients who are adjacent to the property referred to in the attached letter, and we are wondering whether the contents of the attached letter are equally

applicable to other properties subject to the 34:1 approach slope.

Also, would the statement about the power line along the south side of Highway 1 be consistent in every case?

My clients are interested in developing their property, but they do not wish to spend the time and effort necessary to obtain engineering studies for a specific improvement if that improvement would be prohibited because it penetrates the approach slope or is not shielded by the power line along Highway 1.

Please let me have your statement concerning these matters as soon as reasonably possible.

Very truly yours,

/s/ William L. Meardon
William L. Meardon

WLM:seh
Enclosure

EXHIBIT "C"

HAYEK, HAYEK & BROWN
Attorneys at Law
Bremer Building
120½ East Washington Street
Iowa City, Iowa 52240-3976

Will J. Hayek (1896-1982)
John W. Hayek
C. Peter Hayek
David E. Brown

Area Code 319
Telephone 337-9606
Fax 338-7376

Lisa A. Oxley

August 4, 1992

Federal Aviation Administration
Air Traffic Division, Central Region
601 East 12th Street
Kansas City, Missouri 64106

Attn: Kathy Randolf

SENT TO FAX NO. (816) 426-2187

Dear Ms. Randolf:

I am writing in reference to a conversation you had earlier this week with Richard Blum, Chairman of the Iowa City Airport Commission.

The City of Iowa City has been involved in litigation, brought by Dean and Phyllis Fitzgarrald, regarding land adjacent to the airport. The court has ruled in favor of the City on this case, and recent affirmation of the ruling was obtained by the City in the Iowa Supreme Court. However, the plaintiffs, represented by Mr. William Meardon, have petitioned the court for a rehearing.

The basis of Mr. Meardon's petition is a letter he received from Mr. Terry Bolerjack, dated March 24, 1992. That letter was an answer to Mr. Meardon's letter of December 26, 1991, concerning a different matter. Paragraph three of Mr. Bolerjack's letter states, in part, "If we received a proposal to be located in the approach trapezoid and it exceeded the 34:1 slope, we would determine it to be a hazard . . . and proceed . . . to prevent its construction".

The specific contention raised now by Mr. Meardon appears to be that Mr. Bolerjack's statement constitutes an "up-front" prohibition of any development in all such areas.

As Mr. Blum indicated, we would greatly appreciate a clarification of the normal practices and procedures employed in such matters.

I believe Mr. Blum also indicated that we have been ordered by the Supreme Court to submit our response by Monday, August 10.

Sincerely yours,

David E. Brown

DEB:mec
cc: Richard Blum

EXHIBIT "D"

LOGO
U.S. Department
of Transportation

**Federal Aviation
Administration**

Central Region
Iowa, Kansas,
Missouri, Nebraska

601 E. 12th Street
Kansas City, Missouri 64106

AUG 5 1992

Hayek, Hayek & Brown
ATTN: Mr. David E. Brown
120½ E. Washington Street
Iowa City, IA 52240-3976

Dear Mr. Brown:

This is in reference to your correspondence dated August 4, 1992. In your letter you referenced our letter dated March 24, 1992, to Mr. William L. Meardon in response to general questions about his clients interest in developing their property. The third paragraph indicated that we would consider a structure that exceeded the 34:1 slope to be a hazard. While this is generally correct from a Part 77 and airport design standard, in actual practice, there are exceptions, as determined by the facts of each case.

In the Iowa City situation at the approach end of Runway 6, we have determined that some structures would not be a hazard while others would. For example there is a fitness center which exceeded the 34:1 approach slope by 5 feet. This was not considered to have a substantial adverse effect because the ground level between the fitness center and the runway exceeded by 8 feet. The

fitness center, therefore, would not have any greater adverse effect on the proposed instrument approach to Runway 6. Another proposal that we studied exceeded the 34:1 by as much as 36 feet. Since minimum descent altitudes are raised/lowered in 20 foot increments, anything that exceeded more than 20 feet would require us to raise the minimums an additional 20 feet or more. We considered this to be a substantial adverse effect and a hazard determination was issued.

As stated in our letter referenced above, we would be happy to review any proposal or alteration by any individual wishing to develop property which requires notification under FAR Part 77 standards. We have researched our files and cannot find any evidence that we have received any notices of proposed construction or alteration from Dean and Phyllis Fitzgarrald.

In conclusion, our letter of March 24, 1992, was in response to a question of general applicability. Each notice is studied on a case-by-case basis. All structures that exceed FAR Part 77 standards are presumed to be a hazard pending completion of an aeronautical study. Some are considered hazards to air navigation, others are not based on information gathered during the aeronautical study.

Sincerely,

/s/ Dale L. Illegible
for Terry Bolerjack
Acting Manager, System Management Branch

IN THE SUPREME COURT OF IOWA

No. 90-1845

ORDER

DEAN A. FITZGARRALD and
PHYLLIS FITZGARRALD,
Plaintiffs-Appellants,

vs.

THE CITY OF IOWA CITY, IOWA, and
JOHNSON COUNTY, IOWA,
Defendants-Appellees.

(Filed April 19, 1993)

The motions for limited remand that were filed by appellants following our grant of further review were rendered moot by the opinion filed in this cause on November 25, 1992, and consequently, no ruling on said motions is required.

Dated this 19th day of April, 1993.

SUPREME COURT OF IOWA

/s/ James H. Carter
James H. Carter, Justice

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